

Legal News

Working to Extend Democracy to All

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Ninth Circuit Approves Oregon Control Unit Conditions

By Paul Wright

This is a case which challenged numerous conditions of confinement at the Oregon State Penitentiary's Disciplinary Segregation Unit (DSU), which is a control unit. The ruling does not bode well for prisoners seeking to question such conditions.

The sole plaintiff is Samuel Lemaire. The district court largely ruled in his favor in *Lemaire v. Maas*, 745 F.Supp 623 (DC OR 1990),

which we reported in *PLN* at the time. The state appealed and the court of appeals for the Ninth Circuit vacated and remanded the lower court's ruling. The appeals court opinion is essentially a rubber stamp of approval for common control unit practices.

In making its ruling, despite clear factual disputes, the court relied heavily on Lemaire's behavior. Lemaire is serving a life sentence for murder. Six weeks after arriving at OSP he attacked a guard. Then days after release from DSU for that offense he stabbed a reputed informant and child molester 10 to 14 times. While in DSU he apparently assaulted numerous staff members, bombarded them with feces and urine, attacked other prisoners, stabbed guards and was otherwise difficult to manage.

The district court found most of the response by prison officials to be unconstitutional. While the case was on appeal the U.S. Supreme Court handed down rulings in *Wilson v. Seiter*, 111 S.Ct. 2321 (1991) and *Hudson v. McMillian*, 112 S.Ct. 995 (1992), which refined the legal standards in eighth amendment cases. *Wilson* mandates an inquiry into prison officials' subjective mental state before an eighth amendment violation

can be found. Despite no factual inquiry into this component by the district court, the appellate court decided to rule on the contested issue itself rather than remand the case for factual development in the lower court.

Strip Cells: The appeals court vacated the district court's injunction which required the prior approval of a psychiatrist before clothing, bedding, and basic property like toilet paper could be removed for more than two hours. Apparently OSP prisoners are placed in strip cells where they are left for extended periods of time without things like clothing and bedding, and then must "earn" each item with good behavior. The appeals court held that as long as the state abides by its own rules the constitution is not violated.

Nutraloaf: Nutraloaf is made by mixing the ingredients of normal prison meals into a mess, freezing these ingredients and then baking it. Under OSP rules prisoners can be placed on neutraloaf status when they throw or misuse food or human waste or refuse to return trays or utensils. The status is rescinded when the prisoner shows "acceptable behavior" for more than 24 hours. It cannot last more than seven days. The appeals court held that neutraloaf does not violate the

eighth amendment. Prisoners must only be fed "food that is adequate to maintain health, it need not be tasty or aesthetically pleasing." Even food with foreign objects, or served cold, does not violate the eighth amendment. Because it is nutritionally adequate, neutraloaf is not unconstitutional. The court also held that OSP regulations regarding the use of neutraloaf withstood constitutional scrutiny.

In Shower Restraints: DSU prisoners are handcuffed and shackled whenever they are out of their cells. The restraints stay in place while the prisoners shower. The court held that even if the shower floors are slippery and prisoners may fall while showering, this is not unconstitutional. The court states, "In view of the damage Lemaire has inflicted on staff and inmates alike, his countervailing concern that he might fall down and hurt himself while taking a shower strikes us as absurd. Certainly we do not wish harm to Lemaire, but it is he who puts himself at risk, not the prison administrators."

Exercise privileges: Lemaire has been denied out-of-cell exercise for most of his five year stay in DSU. The district court held this was unconstitutional. The appeals court disagreed. Not-

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ing that under *Spain v. Procnier*, 600 F.2d 189 (9 Cir. 1979), the deprivation of outdoor exercise was unconstitutional, the court went on to hold that for Lemaire it was not because he is a "grave security risk when outside his cell." The court put much emphasis on Lemaire's armed attack on two guards when he exited the DSU's outside exercise cubicle and the fact that he vowed to repeat the attack. Also, the court said, the deprivation of exercise privileges was always imposed as a sanction after a hearing.

The appeals court held that prisoners can exercise in their cells and upheld the lower court's injunction ordering that DSU prisoners be issued tennis shoes for exercise.

Quiet Cells: DSU has six cells with double doors that are constantly lit. These cells are used to segregate "noisy or disruptive" prisoners. The appeals court dissolved the injunction requiring that one of the doors remain open and an intercom be installed to allow convicts to summon guards for assistance in the event of an emergency. The appellate court held one method or another would suffice. Officials also agreed to modify use of lighting in these cells.

Cell Restraints: There was a factual uncertainty on the court's part over whether DSU prisoners are being handcuffed in their cells or if four point "spread eagle" restraints are being used. The appeals court upheld the practice and OSP policy on the matter. "Assuming the imposition of full in-cell restraints, which as the district court found, make it difficult for an inmate to sleep, eat, drink water, or stay warm, state a sufficient objective deprivation under the eighth amendment, their use under existing regulations to maintain

security and safety do not reflect 'deliberate indifference' or malice and sadism." The court noted the practice was upheld at the U.S. prison in Marion, Illinois by *Bruscino v. Carlson*, 854 F.2d 162 (7 Cir. 1988), and that *Williams v. Burton*, 943 F.2d 1572 (11 Cir. 1991), allowed prisoners to be four pointed and have their mouths covered by adhesive tape.

Attorney Fees: The Ninth Circuit held that because he prevailed on a few issues he is the prevailing party and was entitled to reasonable fees.

The majority opinion was that because Lemaire suffered no significant injury from the practices, he was given due process and an opportunity to be heard and officials were not deliberately indifferent to his medical needs, no rights were violated. The opinion repeatedly states that Lemaire is responsible for his situation and has no reason to complain. It states, "We sincerely hope he has learned his lesson. He and no one else holds the key to his future."

The court noted Lemaire's suit has no allegations that he was beaten or roughed up by guards, not even those he stabbed, beat or threw urine and feces on. The court commended OSP officials for their professional restraint.

Judge Noonan dissented. He believed a remand to the district court for a factual development was necessary. He also disapproved "of the majority opinion making a dramatic showing that Lemaire has on occasion acted like a beast..."

Control unit activists should note that the court relied heavily on court opinions which upheld practices at the federal penitentiary at Marion. See: *Lemaire v. Mass*, 2 F.3d 851 (9 Cir. 1993).

Outgoing Mail May Contain Slander

A prisoner at the Iowa Men's Reformatory received a major disciplinary infraction for "verbal abuse" as a result of comments included in a letter he had written to his brother. The prisoner, Rick Bressman, wrote: "... yeah, their (sic) real assholes, my counselor is a dick head, the officers working here are punks, the ladies in the mail room are bitches, now I hope they read this letter and get their kicks off of it."

The rule Bressman was infringed for states: "A resident commits verbal abuse when [he] subjects another person to abusive or defamatory language... in writing or orally, and includes insolence [or] disrespect to another person." Bressman pleaded guilty to the violation and remained silent at his hearing. He was found guilty of verbal abuse and spent two days in disciplinary solitary as a result. He then unsuccessfully appealed the decision arguing that the discipline violated his first amendment right to free speech. A civil rights suit was subsequently filed in federal court pursuant to 42 U.S.C. § 1983.

The court pointed out that: "It is well-established in the eighth circuit and elsewhere that prison officials may not censor inmate corre-

spondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. (Citation omitted.) It cannot be said with a straight face that a reasonable prison official would not have known that Bressman's rights were being violated." The judge said it is a violation of the first amendment to discipline a prisoner for comments that are not directed at particular members of the prison staff.

Prison officials argued that Bressman knew staff members would read his outgoing letter, which means that his comments were directed at those people. "To say that Bressman knew his letter could be read," the court said, "is not the same thing as saying that Bressman directed disrespectful comments to or subjected someone to disrespectful comments. A prisoner cannot be disciplined for comments made in outgoing mail just because the inmate is aware that the mail can be read."

The defendant prison officials were made to pay Bressman \$80.00 a day for each day he was in segregation, along with attorney fees. The state sought to avoid liability by claiming qualified immunity. The court denied the claim, saying the law in this area is well established and the defendants should have known about it. See: *Bressman v. Farrier*, 825 F.Supp. 231 (ND Iowa 1993).

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WI Prisoners Not Entitled to Minimum Wage

In part of the continuing struggle to obtain minimum wages for their labor, five Wisconsin prisoners filed suit under the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201 et seq. The Wisconsin prison industries program, under the name of Badger State Industries (BSI) operates a vehicle and bicycle license plate factory at the Waupun prison and a laundry service at the Oshkosh prison. The customers of both industries are limited to state and municipal government agencies. Prisoners are paid according to Wisconsin statute § 303.01 (4), which is substantially less than the prevailing minimum wage.

The district court dismissed the suit on BSI's motion for summary judgment, holding that the FLSA does not apply to prisoners in this case. The court noted that prisoners are not automatically excluded from the minimum wage provisions of the FLSA. The court cited most recent court decisions considering the application of the FLSA to prisoners and pointed out that most, but not all, have declined to extend the FLSA to prisoners working for private entities.

The court relied heavily on *Vanskike v. Peters*, 974 F.2d 806 (7 Cir. 1992), in ruling in the defendants' favor. *Vanskike* held that paying prisoners minimum wages for their labor would not advance the underlying goals of the FLSA, which are to preserve a minimum standard of living and prevent unfair competition. The first concern is not implicated because the prison provides prisoners with their basic needs.

The threat of unfair competition is adequately addressed by the Ashurst-Summers Act, 18 U.S.C. § 1761-62, which penalizes the introduction of prison made goods in interstate commerce. The Act exempts from sanction those commodities manufactured for use by federal, state and local governments. Thus government use of prison labor does not pose a risk of unfair competition but is seen as paying for the cost of public goods, including the cost of incarceration.

The court held that there is no bargained for exchange of labor in prison because prisoners are, essentially, slaves of the state who cannot look for other work.

In this case the court ruled that BSI serves penological and not economic interests. The penological goal is ostensibly to provide prisoners with job skills and work experience. "Plaintiffs argue that if the state were serious about enabling inmates to become self-supporting upon their release, they would pay inmates minimum wages so that upon release inmates would have some means with which to effect their reintegration into the community. This argument is not without merit. However, it is for the state to determine the manner in which the net revenues generated by prison industries can best effectuate the state's objectives."

The court also concluded that the FLSA did not apply in this case because the goods produced by BSI were sold only to other government agencies.

Thus, the concern with unfair competition, which underlies the FLSA, is not implicated in this case. See: *George v. Badger State Industries*, 827 F. Supp. 584 (WD WI 1993).

Discipline For Rude Letter Struck Down

Lobester Loggins is a Missouri State prisoner. In 1989 he sent his brother a letter. Pursuant to prison policy a prison mail clerk opened and read the letter, which stated in part that "there's a beetle eyed bitch back here who enjoys reading people's mail." The letter continued on in a similar vein. The mail clerk infraacted Loggins for using abusive language. He was found guilty and sentenced to ten days in segregation.

Loggins filed suit under § 1983 claiming that the infraction violated his first and fourteenth amendment rights. The district court denied prison officials qualified immunity which the court of appeals for the eighth circuit affirmed on an interlocutory appeal. The district court granted Loggins' motion for summary judgment on the issue of liability and scheduled a jury trial for damages. The jury awarded Loggins \$102.50 in actual damages. The district court ordered the infraction expunged and awarded Loggins' attorney \$25,000 in attorney fees. The court of appeals for the eighth circuit affirmed.

The court held that as a matter of law the language in Loggins' letter did not implicate security concerns, thus the infraction violated *Procunier v. Martinez*, 94 S.Ct. 1800 (1974). The court noted this case was virtually identical to *Moody v. McNamara*, 606 F.2d 621 (5 Cir. 1979), where prison officials refused to mail a letter where the prisoner author claimed the mail-room clerk, "while reading mail, engaged in masturbation and 'had sex' with a cat." The *Moody* court held

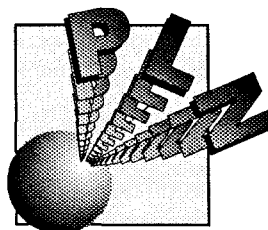
the comments were protected under the first amendment and could not be censored. The key point is that the comments were directed to outside citizens, not to prison staff or other prisoners.

The court in this case agreed and affirmed. The appeals court also affirmed the award of attorney fees for Loggins. The court discussed the reduction of fees where only partial success or little damages are recovered. See: *Loggins v. Delo*, 999 F.2d 364 (8 Cir. 1993).

Bankruptcy Appeal Filed When Mailed

Three Pennsylvania state prisoners appealed the dismissal of their appeals from bankruptcy court after the district court held the appeal was untimely. Bankruptcy appeals must be filed within ten days, and in this case the prisoners gave their appeals to prison officials within the ten days, but they were not received by the court until eight days after it was due.

The court of appeals for the third circuit vacated and remanded. The appeals court applied *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379 (1988), to bankruptcy appeals and held that the appeals are filed when given to prison officials for mailing. The court gave an extensive discussion of *Houston's* application to the filing of documents by prisoners, including a review of other circuits rulings on this issue. See: *In re Flanagan*, 999 F.2d 753 (3 Cir. 1993).



Law of Medical Treatment Explained

Case Goes to Trial Over \$12.40 Pair of Glasses

By Ed Mead

A prisoner at the Iowa State Penitentiary (ISP), Dean Benter, filed a suit under 42 U.S.C. § 1983, alleging he was subjected to cruel and unusual punishment in violation of the eighth amendment. Benter claimed his captors were deliberately indifferent to a serious medical need when they withheld his prescription eyeglasses to compel him to pay for the glasses. Benter sought injunctive relief and damages. The state denied that any constitutional right had been violated and they asserted the affirmative defense of qualified immunity. The case went to trial.

This is one of those many prisoner rights law suits in which even if the state wins they lose. In this case the state didn't win. The facts, as the court found them, were that Benter's prescription glasses were broken during an altercation with guards. He said guards broke his glasses when they wrestled him to the ground and handcuffed him using excessive force. Benter was subsequently examined by an optometrist, who ordered replacement glasses at a cost of \$12.40. At the trial the optometrist testified that Benter "cannot recognize his own mother across the street without glasses."

Prison policy requires convicts to wear state-issued glasses. If the glasses are lost or destroyed they are supposed to be replaced at the prisoner's expense. Benter had no money. Thus, his captors withheld the glasses from him.

The applicable law is that a prisoner must establish deliberate indifference to his or her serious medical needs in order to prove an eighth amendment cruel and unusual punishment violation. In order to prevail in this case, Benter had to establish (1) that he had a serious medical need, and (2) that prison officials were deliberately indifferent to this need.

A serious medical need is defined as "one that has been diagnosed by a physician as requiring treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Johnson v. Busby*, 953 F.2d 349, 351 (8 Cir. 1991).

A legal definition of "blind" or "blindness" is "central visual activity of the number 20/200 or less in the better eye with the use of a correcting lens." 42 U.S.C. § 416(i)(1)(1991). Medical testimony at trial was that Benter's vision without his glasses was 20/400. Accordingly, when prison officials refused to give Benter his replacement glasses until he paid for them, the result was that his eyesight fell within the parameters of a definition of blindness. "Even a lay person," the court said, "would recognize 20/400 vision as a serious medical need."

In order to establish the second prong of the eighth amendment test, Benter also had to establish deliberate indifference to his serious medical need. To prove deliberate indifference he must show that prison officials acted with the culpable state of mind necessary for the punishment to be regarded as cruel. The court found in Benter's favor in this regard as well. There is substantial authority saying deliberate indifference is established if necessary medical treatment is delayed for non-medical reasons. Also, the law is

well settled that delay in medical treatment of a serious medical need cannot be justified as a means to compel payment. "The government must pay for medical care that it has a constitutional duty to provide," the judge held.

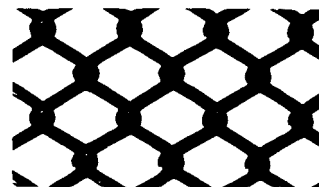
The court found each of the defendants liable, including the optometrist, and went on to deny their claim of qualified immunity. Benter was given injunctive relief. However, because he could have easily paid for the glasses and mitigated his ongoing difficulties, the court awarded him only nominal damages. The court's conclusion to this case is instructive. Citing the famous line by Donn Pearce in *Cool Hand Luke*, "What we have here is a failure to communicate," the judge said:

"This case clearly shows how dysfunctional the grievance system is at ISP. For the past 18 months an inmate, who is legally blind without this glasses, has not had these glasses. In response to his grievances, prison officials... parrot a policy rather than attempt to resolve the dispute. Plaintiff, who could afford to pay for the glasses, refused to do so in the belief the institution should treat his serious medical need at its cost. Once again the court serves as a vehicle for the parties to share information, which of course they do not act upon because now litigation is pending, and it is easier to let the court solve the problem.

"As a result, in the course of the parties' haggling over this \$12.40 pair of glasses, thousands of dollars of corporate, state, and federal resources are expended. Prison officials refuse to break out of the litigation lockstep being used as a supplement to the existing grievance system, and

prisoners readily turn to elaborate court proceedings rather than mitigating their damages.

"While it should make sense for the court to defer to the prison administration, court intervention is clearly needed when obduracy and mindless recitation of policy are all that either party brings to the table. With attitudes like this, it is no wonder that prisoner § 1983 cases comprise over 40 percent of this district's civil docket." See: *Benter v. Peck*, 825 F.Supp. 1411 (SD Iowa 1993).



Conditions Habeas Requires Administrative Exhaustion

Raleigh Irby is a prisoner at the federal Metropolitan Correctional Center (MCC) in Chicago. He petitioned the district court for release under 28 U.S.C. § 2241 (the habeas corpus statute) because he was not receiving adequate medical treatment for severe congenital disk disease.

The district court held that Irby's petition for release was barred because he had not first exhausted his administrative remedies with the Bureau of Prisons. The purpose of the exhausted remedies doctrine "is to allow administrative agencies to correct their own mistakes and thus to avoid needless and costly litigation." See: *Irby v. True*, 823 F. Supp 582 (ND IL 1993).

Washington State DOC "Work Ethic" Program; Capitalist Training Camp, or Liberal Rehabilitation Scheme?

By P. L. G.

During the last session of the Washington State legislature, there was a bill passed mandating that DOC implement a "Work Ethic Program" by November 1, 1993. The McNeil Island Annex, a minimum security work camp, was the site chosen, and being housed there myself, I have had the opportunity to see the camp staff hired, new additions to the facility built, and now the first class of prisoners arrive to begin their "Work Ethic" experience. [This is a so-called boot camp.]

When I first heard of the "Work Ethic" camp my first reaction was: "Who in DOC knows anything about work, or ethics"? And then I thought about the obvious, and blatant capitalist message that was being sent by the powers that be, that if paraphrased would go like this: "If someone breaks the law, what they need is a little capitalist training, so they can become manageable, exploitable, good little worker bees."

On the other hand this is the first time since the Sentencing Reform Act took effect, in 1984, that there has been law that provided for an alternative to long prison terms. Part of the idea of the "Work Ethic" program is that if a prisoner "successfully" completes the 4 month program, he/she will forgo a 28 to 52 month prison term. (I have not read a copy of the exact law that created the program, and am going by what propaganda I have picked up from DOC staff, so some of the particulars of the law may be different than what I report.) In this day of the infamous three strikes you're out, any new, more liberal approach

to sentencing is good news for the people. I truly believe that the only thing long prison terms cure is heterosexuality. It is also a pro-social approach that affirms that people can change if given the chance. Again since the SRA took effect this is the first time that rehabilitation has become a factor in sentencing. To only have the choice of putting someone in prison, as the sole option for judges to pick from, makes for a bleak picture for anyone found guilty of a crime. Any move toward a more humane sentencing system is a move in the right direction.

So as far as the answer to the question that I posed at the beginning of this article, the jury is still out. The best thing to do is for me to describe how the State is implementing the program, and let the reader discern if the new program has any value, or if the Powers That Be have thought up a new weapon in the war of the classes.

To be eligible for the program, a man or woman must be between the ages of 18 and 28. Not be mentally or physically handicapped. Have no history of violence, and the crime for which they are sentenced is non-violent. The prisoner also cannot have served an adult term in prison. Contrary to press reports, one does not have to be a first time offender. Someone may have a felony conviction, and still be eligible for the program, but the conviction must have only resulted in county jail time, like the 90 day sentences handed out for auto theft and forgery. A prisoner must agree not to appeal his conviction, even if they are kicked out of the program. They also must agree to not

use the DOC Offender Grievance program that other prisoners use to address problems that arise while being locked up, such as abusive treatment by guards, poor health care, etc. The sentence must be between 28 and 52 months, the judge at sentencing must recommend the program, and DOC can refuse any person it wants to admission into the program.

Once the prisoner is screened and accepted, he/she is shipped to the McNeil Island Annex. A new thirty member class starts on the first of each month. The first class which arrived here, on the 1st of November, consisted of 31 people: 5 women, and 26 men. The racial breakdown was: of the 5 women, 3 were African American, and 2 were white. Of the men, 12 were Hispanic, 13 African American, and 2 were white. They start their day out at 5:00 am with a 40 minute para-military work out. They then eat breakfast and go out on the island doing all sorts of heavy labor, this lasts until 3:00 pm. I have had the chance to observe them, and they look like the old chain gangs that I used to see as a child in Florida, all except for the chain, but given that this is an island, one would have to be a world class swimmer to escape. Their evenings are spent until 9:00 pm in classes that range from drug education, to self esteem training. The para-military part of the program is minimal, everyone thought that it would be a "boot camp" ala Paris Island, but at least for the first group, it seems to be more of a work training/get in touch with your feelings program. After 4 months of this "Work

Ethic" training, the successful graduates are placed back in the community where they will be extensively "monitored" by a parole-like officer for at least a year.

The Powers That Be seem to want this program to be a success. They hired three women for the three top positions; and they all seem to be a cut above the average DOC dolt. They have shipped out any staff that was in anyway "macho," and seem to be trying to be as caring to everyone as possible. But on the other hand DOC is up to its old tricks; of the 12 Hispanic men, 11 have immigration holds and will be shipped back to their country of origin upon completing the program. This means that there is a high chance that they will not come back to Washington State, knowing that they have a prison term waiting for them if they do. This means that DOC can turn and say: "Look how effective this program is, of the first class we have had only a 40 percent recidivism rate, so we need more money to fund this type of program," so yes, it appears that DOC has stacked the deck. Imagine that.

Whatever DOCs plans, the young prisoners may have other ideas. The fifth night that they were here on the island, they had a fist fight break out over the TV channel, there were a total of 21 men involved. Instead of taking all of them to the hole, they decided that they would single out just three and make an object lesson out of them. How they decided on just who to single out, is one of the correctional mysteries that we have all seen in the past, but they found three warm bod-

ies, and with a stroke of a pen made them the first "failures" of the program. On day ten of the program, one of the young lads decided that he no longer wanted to do any more of the work tasks that he had been given, and told the staff to take him to a "real prison." Needless to say, staff obliged.

So you, the reader, can make up your own mind as to whether this program is of any value to the people. In reality the vast majority of the prisoners that will go through this program are drug offenders, and until the powers that be realize that the drug problem is a medical issue, that is best handled by the medical, and psychological communities (like it is in England), and not by the police, courts, and prisons, any program in a prison-like setting is a feeble attempt at best. We live in a capitalist society, and the primary purpose of any institution in this society is to enhance the profits of the few at the expense of the many, i.e. the lower classes. The purpose of prisons is to profiteer off the misery of others, and until true democracy is bestowed upon the people, and the people are empowered with the means of production, we will have prisons whose only purpose is pain and suffering. Social change happens in two ways; one through revolution, the other through incremental, methodical education of the people. As prisoner advocates we must be pragmatic, which means we should wait and see if the "Work Ethic" program is all stick and no carrot, or if it is a more liberal attempt to sentencing which provides for shorter prison terms. Needless to say those of us who have watched the state muck up everything it touches, find it hard to be confident.

Exposure to Cold Weather States Claim

Ronald Chandler is a Missouri state prisoner. He filed suit claiming that prison officials violated his constitutional rights by providing a dining room too small to accommodate all the prisoners in his housing unit at once; poorly supervising the noisy and chaotic dining room; not providing enough salt and pepper shakers or cereal bowls to adequately serve all prisoners; failing to ensure that the trays, pitchers and eating utensils were properly cleaned; and failing to provide enough juice and tea. He also claimed he was often forced to wait outside in the rain or freezing cold without adequate protective clothing while other prisoners finished their meals.

The district court dismissed the entire case as frivolous under 28 U.S.C. § 1915(d). The court of appeals for the eighth circuit, in a brief opinion, affirmed in part and reversed in part.

The appeals court upheld dismissal of Chandler's claims concerning the dining hall because he did not claim or allege he was denied a reasonably adequate diet and failed to allege any facts showing he was denied the "minimal civilized measure of life's necessities."

The appellate court reversed the dismissal of the claim of being forced to stand outside in the cold and rain without adequate protective clothing. "We have previously held that needlessly subjecting inmates to freezing weather without adequate protective clothing could amount to cruel and unusual punishment." While the facts were slim, they're sufficient to preclude a § 1915(d) dismissal. See: *Chandler v. Moore*, 2 F.3d 847 (8 Cir. 1993).

Court Declines to Define "Frivolous" Suits

Anthony Brown is a Maryland state prisoner. After telling prison medical staff he had already been vaccinated, he was given another tuberculosis inoculation and broke out in a rash. Brown filed suit under § 1983 claiming that the vaccination violated his eighth amendment rights. The district court granted Brown leave to proceed *in forma pauperis* and then dismissed the suit for failing to state a legal claim under 28 U.S.C. § 1915 (d). The court of appeals for the fourth circuit affirmed.

The appeals court gives a brief overview of the history of prisoner civil rights litigation. Noting that in 1966 state prisoners filed 218 suits in federal courts while in 1991 they filed 36,722. It is clear that the appeals court takes a rather dim view of prisoner litigation and makes the interesting claim that by subjecting prison employees to civil rights litigation it "deters qualified technical personnel from accepting or retaining positions in prisons where they must spend a great deal of their time defending and preparing for lawsuits. Thus, the mone-

tary claims themselves may have the effect of diminishing the capabilities of prisons to raise their own standards."

The court points out that 28 U.S.C. § 1915 (d) allows district courts to dismiss suits that are frivolous or malicious. The court examines the recent Supreme Court cases which hold that the district court has broad discretion to decide which suits are frivolous.

"...a district court judge should exercise his or her discretion in determining whether a prisoner petition should be dismissed under § 1915(d). ...the district court should dismiss the case if it is satisfied that the complaint is based on an 'indisputably meritless legal theory,' or if the factual allegations are 'clearly baseless.' Like the Supreme Court noted in *Denton*, it is unnecessary for higher courts to define these standards with more precision, and we will instead leave such determinations to the district courts."

In affirming the dismissal, the appeals court points out that dismissal under the *in forma pauperis* statute is without prejudice and does not prevent the plaintiff from refileing the complaint as long as he/she pays the filing fees and service costs.

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Prisoner's Assault Claim Must Go To Trial

William Moore is a prisoner at the Southern Ohio Correctional Facility (SOCF) in Lucasville. He filed suit under 42 U.S.C. § 1983 claiming that his eighth amendment rights were violated when prison guards came to his cell, handcuffed him, and proceeded to savagely beat him with fists and clubs. The defendants filed for summary judgement and painted a completely different picture of events.

The defendants stated that a major disturbance was in progress with prisoners flooding the cellblocks, starting fires, and throwing objects. They claimed Moore was one of the instigators. They said that after being handcuffed and escorted out of the area Moore turned and grabbed one of the guards shirt collar. The other guards then used their clubs in a "come along" technique to control Moore. After being restrained, they claimed Moore was taken to a set of stairs where he slipped and fell, injuring two guards. The defendants denied striking and beating Moore. The district court granted the defendant's motion for summary judgement over Moore's objections.

The court of appeals for the sixth circuit reversed and remanded the case for trial. As a preliminary matter the court addressed Moore's objection that documents relied upon by the district court in granting the defendant's motion for summary judgement did not satisfy the requirements of Fed.R. Civ.P. 56(e). The appeals court agreed that the documents in question, photocopies of Moore's prison medical records, investigation report of the incident made by prison officials, statements made by witnesses during the investigation, and a prior court opinion made in an unrelated case, did not satisfy Rule 56(e) because they were all unsworn and uncertified. But because Moore did not object to the materials inclusion in the record before the district court, the issue was not reviewable on appeal.

The appeals court held that several genuine issues of material fact existed which precluded the entry of summary judgement for either party and required a trial. Most crucial of the disputed facts were the dates involved. Moore claimed the prison disturbance took place on April 26 and he was assaulted on April 27.

The defendants claimed the disturbance was in progress on April 27 when Moore was being removed from the area. This issue is extremely important because it determines what legal analysis is going to be used. Under *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078 (1986), prison officials are given wide leeway in the violence they use to suppress prisoner resistance. By contrast, *Hudson v. McMillian*, 112 S.Ct. 995 (1992), sets a more stringent standard when prisoners are assaulted and no ongoing emergency is present.

Another decisive issue of fact was the incident itself. Moore provided evidence that he was beaten without cause or reason. The defendants countered with evidence that Moore became disruptive and his injuries resulted from a fall. Whether or not Moore was actually assaulted is critical to his eighth amendment claim.

Also in dispute, and affecting the legal standard to be applied, was whether or not Moore was a participant in the disturbance. Because issues such as these are in dispute, the court of appeals said the district court erred in granting summary judgement to the defendants. See: *Moore v. Holbrook*, 2 F.3d 697 (6 Cir. 1993).

MI Hearing Officers Have Absolute Immunity

James Sullivan is a Michigan state prisoner. He was infracted for having a urinalysis test that indicated marijuana use. At his disciplinary hearing he stated he had been using the legal pain killer and anti-inflammatory Ibuprofen, which was sold in the inmate store. He sought to introduce evidence showing Ibuprofen caused false positives for marijuana use in EMIT urine tests. The hearing officer refused to accept the evidence, and found Sullivan guilty of the disciplinary charge.

Sullivan filed suit under 42 U.S.C. § 1983, alleging that the hearing officer's refusal to even consider his evidence violated his right to due process of law. The district court disagreed and dismissed the complaint as being frivolous.

In Michigan, disciplinary hearings are conducted by professional hearing officers, who are attorneys, under the direction and supervision of a special hearing division of the Michigan Department of Corrections (DOC). Citing *Shelly v. Johnson*, 849 F.2d 228 (6 Cir. 1988), the court held that Michigan DOC hearing officers are entitled to absolute judicial immunity in the case and could not be sued.

The court considered the merits of the case and ruled that even if he could be sued, the hearing officer had not violated Sullivan's rights. Those interested in urinalysis testing, and legal challenges to it, should read this opinion, as it discusses the reliability of the EMIT test system and prevalence of false positives. See: *Sullivan v. Ford*, 828 F.Supp. 480 (ED MI 1993).

Death Row Prisoners Entitled to Limited Contact Attorney Visits

This case involves a class action suit filed by Oklahoma death row prisoners and prisoners in the control unit of the Oklahoma State Penitentiary. The case provides a revealing look at the mentality driving the construction of control units.

The OSP control unit is called H Unit. It was opened in November of 1991, planned and designed by an informal DOC committee. The court states: "The philosophy and design of the new unit were modeled on the federal penitentiary at Marion, Illinois, the highest security facility in the federal prison system. There is no direct proof or reasonable inference that this non-contact philosophy was in response to any specific act or situation that existed in H block. Rather, it appears to be a general philosophy that the less the contact the less the danger."

When H Unit opened prison officials had made no provision for confidential attorney visitation. The current attorney-client visitation provisions are what is being challenged in this suit. The accommodations have the attorney separated from his client by grated plexiglass and a barred window. There is a pass-through space 16 inches wide and 4 inches high. All the attorneys and clients who have used the cubicle testified that after 15 minutes of looking through the grate at someone they experienced dizziness, headaches, and a lack of focus. Prison officials had agreed to place a clear plexiglass section in the grate at eye level for unimpeded vision.

Also challenged was the lack of provisions for confi-

dential attorney calls. No provisions were made for this when H Unit was opened. Since then prison officials have tried to accommodate this need with a rolling telephone cart that is taken directly to the prisoner's cell. The problem is that virtually all of the 125 prisoners on death row are double celled and thus denied confidentiality in their attorney phone calls.

The court made extensive and detailed findings of fact in this case. It found that despite being a "non-contact" unit, there were a multitude of instances where prisoners had contact with others, including the general public.

For the purposes of this case it is interesting to note that there are no recorded cases, anywhere in the nation, of attorneys being attacked or assaulted by their death row or control unit clients. At least nine states and all Oklahoma counties and the Oklahoma Women's Prison allow death row/control unit prisoners full contact visits with counsel. The court noted: "Together these facts compel a finding that OSP maintains an institutionally sanctioned attitude of hostility and opposition to attorneys who attempt to represent death row inmates. It appears that discretion, reasonableness, and fair evaluation by prison administrators regarding attorney requests and judgments on behalf of their clients is seriously lacking. The blanket adversarial position taken against attorneys representing death row inmates is apparent on this record and [is] unjustified." The court thereupon decided to rule in favor of prison officials.

The court noted that most courts who have considered this question to date have found that prisoners' right of meaningful access to the courts includes contact visits with their attorney. The

court discussed the *Turner v. Safely* standard and said that if that were used the plaintiffs would win. To avoid that outcome, however, the court went on to hold that the present system, with the 16 by 9 inch slot and installation of a clear barrier at eye level, were sufficient for prison officials to discharge the duty to provide contact attorney visits to death row prisoners "so long as meaningful contact is not impeded."

The court said that the arrangement may be unconstitutional in some circumstances, i.e. with mentally retarded or hearing impaired prisoners. Thus, "while the present setting, with the replacement window, is not constitutionally impermissible, it may well be under certain circumstances. The court will not allow prison officials the ability to refuse full contact visits without consideration of special circumstances and inmates with special needs."

Regarding the lack of confidential lawyer calls, the court rejected the defendants' contention that confidential attorney calls were not required because confidential visiting is. Noting that most attorneys representing death row prisoners are at least three hours away by car from OSP, the court held that meaningful access to the courts require confidential attorney calls. The solution ordered by the court was that prison officials provide a longer phone cord on the telephone cart to permit the prisoner to take the phone to the back of his cell and "achieve privacy from his cellmate."

This case illustrates the prison's complicity in speeding up the death penalty process by denying the condemned their right to full access to counsel. See: *Mann v. Reynolds*, 823 F.Supp. 894 (WD OK 1993).

Classification Chief Liable For Attack

Israel Nelson was convicted in an Ohio court of assaulting his common law wife and was sent to a medium security prison. His wife contacted him and informed him that her brother, a major cocaine dealer, was plotting to have him attacked by associates at the prison. Based on this information, Nelson sent two letters to Roger Overberg, the chief of classification for the Ohio Department of Corrections (DOC), informing him that he feared for his safety.

Overberg's sole response was to send Nelson a form letter about initial classification. The letter in no way addressed Nelson's safety concerns, and Overberg conducted no investigation of Nelson's claims nor did he instruct Nelson to contact local officials or seek protective custody. Nelson was severely beaten by two assailants and spent five days in the hospital.

Nelson filed suit under 42 U.S.C. § 1983, claiming that Overberg had violated his eighth amendment right to remain free from cruel and unusual punishment when Overberg reaffirmed his prison placement after Nelson informed him that he had enemies there.

Overberg filed for summary judgment on qualified immunity grounds and the district court denied the motion. Overberg appealed and the court of appeals for the sixth circuit affirmed.

The court held that its decision in *Roland v. Johnson*, 856 F.2d 764 (6 Cir. 1988), established a clear right for prisoners to remain safe from attack by other prisoners. One of the defendants found liable in *Roland* was also, like Overberg, the chief of classification. Thus Overberg should have known that as a prison official he had an obligation to take reasonable steps to protect Nelson from attack by other prisoners.

The court concluded there was sufficient evidence for a jury to conclude "that Overberg knew of a threat to Nelson's safety and yet disregarded it, despite the availability of relatively effortless ways of addressing it, and that Overberg's conduct amounted to a conscious lack of concern or aloofness." In any case, Overberg was not entitled to qualified immunity. See: *Nelson v. Overberg*, 999 F.2d 162 (6 Cir. 1993).

Only One Appeal On Qualified Immunity

This case involves a taxpayer suing an IRS agent claiming her constitutional rights were violated when the agent garnished her wages and seized her house, even though he knew she owed no taxes. While this is not a prison case, the legal issue presented, appeals of denial of qualified immunity, is familiar to any prison litigator because a qualified immunity defense is frequently invoked by prison officials.

In this case the IRS agent sought summary judgment on qualified immunity grounds in 1989. The district court denied the motion and Silverman filed an interlocutory appeal which he later dismissed. In 1991 Silverman again sought summary judgment on qualified immunity grounds, which the court again denied. Silverman filed yet another appeal.

The court said the purpose of allowing immediate appeals of the denial of qualified immunity is to safeguard the immunity from suit that the doctrine represents, rather than a mere defense to liability. The opportunity to appeal an adverse qualified immunity ruling before trial preserves the defendant's rights.

The appeals court went on to hold that: "A defendant is not, however, free to file multiple pre-trial appeals from denials of qualified immunity motions." The court relied on *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865 (9 Cir. 1992), in which that court held "one such interlocutory appeal is all that a government official is entitled to and all that we will entertain."

The court held that because Silverman filed an appeal previously, even though he had dismissed it, he'd had his opportunity for pretrial appellate review and chose to forego it. "Silverman had his one pre-trial bite at the appellate apple, and under *Pelletier*, he is not entitled to another."

The court adopted the *Pelletier* rule for all second qualified immunity appeals. Thus adopting a categorical rule easily understood by litigants and easily applied by the courts. Silverman's appeal was then dismissed for a lack of jurisdiction. See: *Nelson v. Silverman*, 999 F.2d 917 (9 Cir. 1993).

Common Law Right to Inspect Court Records

This is not a prison case but it involves a net maker's suing a competitor for theft of trade secrets. In the course of the litigation various documents were submitted under seal and protective order to the court. That litigation was settled. A shareholder in Applied Extension Technologies (AET) filed suit against AET claiming securities fraud and sought disclosure of the sealed records in court custody. The district court denied the shareholder's motion and he appealed.

The court of appeals for the third circuit vacated and

remanded. The court gave an extensive history of the "existence of a pervasive common law right to inspect and copy public records and documents, including judicial records and documents." This right antedates the constitution and applies to both criminal and civil cases.

The court noted that access to civil proceedings records promotes public respect for the judicial process and helps assure that judges perform their duties in an honest and informed manner. The court said it has applied the presumption of public access to a wide variety of civil records, including summary judgement exhibits, civil trial transcripts and exhibits, settlement documents and transcripts of hearings for a preliminary injunction.

The court held that filing a document in court "gives rise to a presumptive right of public access." Numerous other courts have agreed. Thus, in this case, the shareholder was entitled to disclosure. This is a useful case for anyone seeking disclosure of court records of any type. See: *Levcadia, Inc. v. Applied Extension Technologies, Inc.*, 998 F.2d 157 (3 Cir. 1993).

Visitor Cannot Withdraw Consent To Search Once Search Has Begun

This prison case comes to us via a suppression of evidence hearing in a federal drug prosecution.

Arthur Spriggs went to visit a prisoner at the Lorton Reformatory, a District of Columbia prison. Prior to entering the prison all visitors are subjected to a pat search. Spriggs was pat searched, removed his shoes and al-

lowed his mouth to be searched. When informed he could not wear sweat pants under his jeans he offered to remove them. Upon removing the sweat pants the guard requested to examine his groin.

At this point Spriggs objected and sought to terminate the attempt to visit in order to halt the search. This was refused and Spriggs was restrained by guards and a federal agent who continued the search. They discovered ten balloons of heroin and one of cocaine.

The district court expresses quite a bit of frustration at drug cases arising out of Lorton and calls the prison a "public disgrace" due to the ready availability of drugs within the prison.

The court went on to hold that once a prison visitor has received fair notice of the scope of a search, they cannot withdraw consent once the search has commenced. To do so, the court ruled, would frustrate efforts to curtail drug smuggling into prisons "by providing a secure escape for a smuggler whenever a search threatened to detect the contraband."

The court distinguished this case from others which involved strip searches or random searches of prison visitors. The court denied the suppression motion. It appears Mr. Spriggs will be visiting prison on a somewhat permanent basis. See: *U.S. v. Spriggs*, 827 F.Supp. 372 (ED VA 1993).

Making Con Drink From Toilet States Claim

A *pro se* prisoner at the Indiana State Prison, Craig Thomas, filed a civil rights claim under 42 U.S.C. § 1983. The complaint raised a number of issues, only one of which survived the state's

motion for summary judgement. The surviving claim was an eighth amendment violation flowing from Thomas' placement in a segregation cell which had no running water in the sink. Thomas filed numerous complaints, and was told by his captors that the sink would be fixed. During the ensuing 33 days no repairs were initiated or completed on the sink. Thomas maintains that he had to drink water from the toilet in his cell.

Summary judgement was not granted in this case because the district court judge found a genuine issue of fact as to deliberate indifference, as well as the material fact of whether the cell had access to running water. Hence, the judge ruled, there were issues of material fact on both the objective and subjective components of the eighth amendment claim. See: *Thomas v. Brown*, 824 F. Supp 160 (ND IN 1993).

Parole Commission Guidelines Not Ex Post Facto

The federal prisoner in this case, Noble Simpson, filed a *pro se* habeas corpus petition against the U.S. Parole Commission. Simpson's suit challenged, on *ex post facto* grounds, the Commission's application at his second parole hearing of its guidelines which were not in effect at the time of his first hearing. He also alleged that the Commission violated the separation of powers doctrine by establishing parole guidelines exceeding those established by Congress. The district court granted summary judgement in favor of the respondent Parole Commission. Simpson appealed from that judgement and the appeals

court affirmed the finding that there was no genuine issue for trial.

With regard to *ex post facto* claims, the appeals court noted that Simpson's claim was that the 1990 guidelines "substantially diminish[ed] or eliminat[ed] [his] eligibility for parole." The court responded by noting that the parole commission determines a prisoner's suitability for parole, not his eligibility, as the latter is determined by the length and nature of one's sentence.

As for Simpson's claim that the commission violated the doctrine of separation of powers by establishing parole eligibility guidelines which exceed those established by Congress, once again the court of appeals relied on the differences between suitability and eligibility. The Parole Commission, the court said, "determines a prisoner's suitability for parole, not his eligibility, and Congress has vested the Parole Commission with the authority to 'grant or deny an application or recommendation to parole any eligible prisoner.'" See: *Simpson v. Ortiz*, 995 F.2d 606 (5th Cir. 1993).

Nominal Damages in Eighth Amendment Claim Upheld

Rederick Cummings was accused of attempting to rape a prison employee. During the course of "investigating" the rape allegations prison officials beat Cummings several times. Cummings filed suit alleging that the beatings violated his eighth amendment rights. At trial a jury found two of the defendants liable and awarded him \$1.00 in nominal damages. The court of appeals for the eighth circuit

reversed and remanded, holding that the district court had erred in excluding evidence prejudicial to Cummings.

The evidence at trial was diametrically opposed. The defendants denied beating Cummings, while Cummings and Melvin Coonce, a former MSP investigator, testified concerning the beatings. It is in this context that the appeals court ruled that the district court had not erred excluding testimony of Cummings' attempted rape of the prison employee and assault of a prison guard, for which he had been convicted in state court. It also upheld exclusion of the rape charges against Cummings. However, the appeals court ruled that the district court had erred when it excluded Cummings' deposition and *pro se* complaint from being used to impeach his trial testimony. In the deposition and complaint he admits he knew he was being interrogated about the rape charge, at trial he claimed he did not know why he was being questioned. The court ruled that with credibility an issue, the deposition and complaint should have been admitted to impeach Cummings. The lower court also erred in excluding evidence of Cummings' prior convictions. Namely, that Cummings, at the trial, denied striking one of the defendants, yet had been convicted in state court of doing just that.

In reversing the verdict the appeals court held that the jury instructions did not correctly state the law in eighth amendment cases. In excessive force cases the jury must find that the defendants acted maliciously and sadistically in applying excessive force, before finding the defendants liable. Thus, the defendants were entitled to a new trial on this issue alone.

The defendants also argued that the court had erred in giving a nominal damages instruction because any use of force serious enough to support an eighth amendment liability claim must also support an award of actual damages. The appeals court disagreed. In somewhat contradictory language the court held "Our eighth amendment precedents have consistently recognized that actual injury is required to state an eighth amendment violation. ...nominal damages are appropriate in eighth amendment cases. In considering the appropriateness of nominal damages in the eighth amendment context, we stated: '...the award of nominal damages is not to compensate the abstract value of the right to be free from a constitutional violation. Rather, it serves as to compensate for a degree of harm sufficient to establish cruel and unusual punishment, but insufficient to support a more substantial measure of damages with a reasonable degree of certainty.'" *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1989).

The court then went on to hold that the Supreme Court's ruling in *Hudson v. McMillian*, ___ US ___, 112 S.Ct. 995 (1992) which states: "...the eighth amendment's prohibition of 'cruel and unusual' punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force" does not contradict their holding in this case. "We read our requirement of actual injury as consistent with the Supreme Court's conclusion that more than *de minimis* force is necessary to state an eighth amendment violation, and thus cannot conclude that *Hudson* abolishes the propriety of nominal damages in eighth amendment cases." See: *Cummings v. Malone*, 995 F.2d 817 (8th Cir. 1993).

No Cause of Action in Reversed Disciplinary Sanction

Victor Sowell is a New York state prisoner. He was infracted for inciting a riot, assault and disobeying a direct order. He was transferred to a different prison and placed in segregation prior to his disciplinary hearing. At the hearing Sowell requested that the infracting guard be present, that a sergeant be interviewed as a witness, and that the incident report be included into evidence. Sowell's staff adviser was able to interview the sergeant but not the guard, nor did he obtain the incident report. Sowell was found guilty at the hearing and sentenced to 365 days in segregation.

Sowell appealed the decision to the New York DOC Commissioner who reversed the infraction for "procedural error." A new hearing was held and the only new evidence the hearing officer received into evidence was the reporting guard's statement. The hearing officer denied Sowell's other requests. Sowell was again found guilty and again sentenced to 365 days in segregation. He appealed and again the infractions were reversed. This time no new hearing was held and Sowell was released from segregation and his record expunged of the infraction.

Sowell filed suit for money damages, claiming that he spent five months in segregation because of due process violations at the two disciplinary hearings.

The district court disagreed. Citing *Young v. Hoffman*, 970 F.2d 1154 (2nd Cir. 1992), the court held that no cause of action for due process violations exist where the hearing officer's decision is reversed on

administrative appeal. A prisoner is afforded his due process rights and protection because the administrative reversal constitutes part of the due process protection received and cures any procedural due process defect that may have occurred during the hearing itself.

The court held that the fact that Sowell was confined in segregation for five months while his appeals were pending was not dispositive. "...even if a due process violation occurred at the hearing, there is no cause of action under section 1983 on the basis of that violation, because the inmate ultimately received the due process owed him under the law. The inmate was able to vindicate his hearing rights by means of the administrative appeal afforded to him. Whether the prisoner was confined during the appeal process is wholly irrelevant to this analysis. Therefore, Sowell has no cause of action for alleged due process violations that Ryan may have committed at the disciplinary hearing." The court characterized the five month delay Sowell spent languishing in segregation while he vindicated his rights in administrative appeals as "unfortunate." See: *Sowell v. Ryan*, 823 F. Supp 107 (WD NY 1992).

"Tough On Crime" Law Increases Michigan Crime Rates

Despite the increased use of prison as a criminal sanction, nearly every category of violent crime rose from 1981 to 1991. In the past decade, Michigan's legislature has passed many "tough on crime" laws and quadrupled the state's corrections budget, according to a study by the Michigan Council on

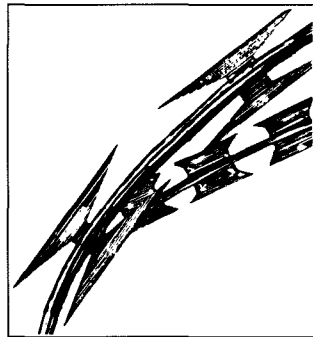
Crime and Delinquency (MCCD).

An MCCD report listed dozens of laws approved by the state legislature since 1981, increasing penalties for many types of crimes. As a result, the State Department of Correction's budget has climbed from \$225 million in Fiscal Year 1981-82 to more than \$1 billion in FY 1992-93. Despite the massive increases in spending, three new state prisons remained empty due to a lack of operating funds.

According to the study, it is clear that criminal justice policy continues to be developed and implemented in Michigan without regard either to effectiveness or cost. In the current legislative session, bills have been introduced to establish mandatory prison terms for burglary, abolish minimum sentence reductions for good behavior, sentence juvenile offenders as adults, and impose additional mandatory penalties for substance abuse.

MCCD called for a moratorium on further crime legislation until sentencing guidelines are developed by an independent panel to replace the current piecemeal system. Community-based sentencing options and crime prevention programs should also be developed, the organization said. No legislation should be approved unless there has been a final impact study, MCCD added.

Source: *Corrections Compendium*



Reviews

La Patria Radical is a bi-lingual (English and Spanish) tabloid published by the MLN (Movimiento de Liberacion Nacional, a Puerto Rican independence party). Each issue provides information about the Puerto Rican independence movement, community activism, government repression of the movement and updates on the numerous Puerto Rican political prisoners and prisoners of war held by the US government for challenging the colonial regime imposed on Puerto Rico. The latest issue has a big insert *The Price of Struggling for Freedom*, which consists of articles by and about Puerto Rican POW's and PP's, their conditions of confinement, struggles, etc., and includes poems and pictures. Anyone interested in either the Puerto Rican independence movement or political prisoners in the U.S. should subscribe. Subscriptions are available for a donation. Write to: MLN, 1112 N. California, Chicago, IL. 60622.

Coalition for Prisoners Rights Newsletter is a national, monthly newsletter, free to prisoners and their families, on politics and prison conditions. Modest sliding subscription fee for others write: CPR, P.O. Box 1911, Santa Fe, NM. 87504.

Endeavor is a bi-monthly tabloid published by death row prisoners in Texas. Each issue contains death penalty and prison news, articles, poems, reviews of Supreme Court death penalty decisions, interviews and more. Subscriptions are \$9.00 a year. Write: Endeavor, P.O. Box 23511, Houston, TX. 77228-3511.

Human Rights Held Hostage is the new newsletter of the Committee for Freedom. The CFF is a grassroots organization that has sprung up around the struggle over the notorious Maximum Control Center (MCC) control unit in Westville, Indiana. The CFF has a revolutionary New Afrikan perspective and seeks to organize around political prisoner issues as well. The first issue of the newsletter has excerpts from George Jackson's *Soledad Brothers*, reports on conditions at MCC, articles on sensory deprivation, etc. Highly recommended. Send donations to: CFF, Box 14075, Chicago, IL 60614-0075.

Ship of Fools is a quarterly newsprint magazine that covers news and counterculture issues. The latest issue has articles on the pot bust of the editor, news items from around the world, organized white supremacist groups in law enforcement, prison news and magazine reviews and more. Subscriptions are free to prisoners, \$10 a year for others. Write: *Ship of Fools*, P.O. Box 2062, Westminster, MD 21158.

Turning the Tide is the quarterly tabloid of People Against Racist Terror. The latest issue has an update on how the racist right (not just the republicans) did at the polls. News on racist activity in other countries and the U.S., anti-racist violence and more are in this issue. It also lists the various PART special reports and audio tapes that they have available. Subscriptions are \$15.00. Write: PART, P.O. Box 1990, Burbank, CA 91507.

Psychedelic Prisoners Newsletter is devoted to legalizing drugs and exposing the effects of the war on drugs on the U.S. population. The second issue has numerous articles on pe-

yote, LSD, cannabis, drug laws, etc., pen pal listings, and more. The second issue is 17 pages long. Subscriptions for a donation to: *PPN*, 107 Tall Trees Ct., Frankfort, KY 40601.

Tapol is the monthly bulletin of the Indonesia Human Rights Campaign. Each issue focuses on political struggle and repression in Indonesia against the fascist junta. Recent issues have had articles on repression in occupied East Timor, the capture of FRETELIN leader Xanana Gusmao, arms sales to Indonesia, the continued imprisonment and persecution of Indonesian Communist Party members, independence struggles in Aceh, Bougainville, and Papua New Guinea. This is the only newsletter that provides consistent and detailed information on these important but little known struggles. Subscriptions are \$25.00 in the U.S., write: *Tapol*, 111 Northwood Rd., Thornton Heath, Surrey, CR7 8HW, England.

WA DNA Identification Statute Upheld by District Court

The state of Washington has adopted legislation requiring prisoners convicted of sex offenses or violent crimes to submit to a blood draw in order to provide officials with DNA identification information. Joe Ryncarz filed a pro se 42 U.S.C. section 1983 action alleging the forcible extraction of his blood violated his constitutional rights. The statute, RCW 43.43.754, requires that every individual convicted of a felony after July 1, 1990, who was convicted of a sex offense or violent crime, "shall have a blood sample drawn for the purposes of DNA identification and analysis." Guards at the Washington State Penitentiary forced Ryncarz to submit to such an extraction.

The court reviewed the case on the state's motion to dismiss. It held that the forcible taking of blood samples for DNA purposes did not violate the fourth amendment, even in the absence of individualized suspicion, because the government had an interest in obtaining such blood. The court also re-

jected the prisoner's free exercise of religion claim under the first amendment. The fact that giving a blood sample was against prisoner's religious beliefs, the court ruled, was immaterial in light of the government's "compelling interest" in getting the prisoner's blood sample.

The motion to dismiss was granted on all but a narrow issue of when Ryncarz raised the religious issue with respect to guards taking the blood sample from him. At this point the constitutionality of the DNA statute has been upheld by the Washington State Supreme Court and the federal district court. See: *Ryncarz v. Eikenberry*, 824 F. Supp 1493 (ED WA. 1993)

BOP Must Disclose Program Statement

George Cowsen-El is a federal prisoner at Marion, Illinois. He filed a Freedom of Information Act (FOIA) request with the Bureau of Prisons (BOP) seeking disclosure of BOP program statement 5511.2, which deals with stand up counts. He also sought disclosure, under the Privacy Act (PA),

of his own medical records. The BOP refused to disclose the program statement and withheld twelve pages of Cowsen-El's medical records, stating they would disclose them to a physician but not to him.

Cowsen-El filed suit in the federal court in the District of Columbia. The court ordered the BOP to disclose the program statement but upheld the withholding of the medical records.

The court held that exemption 7(e) of the FOIA, 5 U.S.C. § 552, which exempts disclosure of law enforcement records, does not apply in this case because the BOP had failed to meet its burden of showing that the program statement was compiled for law enforcement purposes. The court notes that the FOIA's statutory exemptions are to be narrowly construed. Internal agency policies are wholly unrelated to investigations or prosecutions and, thus, are not exempt from disclosure.

The court upheld the denial of Cowsen-El's medical records and the BOP process allowing disclosure to a designated physician. *PLN* readers should note that this case, although published on September 27, 1993, is for some reason dated February 24, 1992.

The court of appeals for the District of Columbia Circuit has addressed this very issue and struck down the BOP requirement for disclosing prisoners medical records only to a designated physician. See: *Benavides v. U.S. Bureau of Prisons*, 995 F.2d 269 (DC Cir. 1993).

The district court ruling in this case on this issue seems directly at odds with the relevant law in the DC Circuit. See: *Cowsen-El v. U.S. Department of Justice*, 826 F. Supp 532 (DC DC 1992).

Editorial Comments

By Ed Mead

Well, at long last here I am writing my very first editorial from the streets! Regular *PLN* readers will remember that some month ago I initiated a campaign to get myself free. For reasons I still don't quite understand, I am finally out here in minimum custody. What this means in real terms is that my cage is larger, my leash longer, the bribes more numerous. Other than that things are just the same. And my work will be the same, too. The newsletter will not only continue, it is going to be even better. And at last I will be able to put some computer time into the calendar project and other *PLN*-related tasks that have been put off for too long.

Paul put together the contents of the December issue all by himself. That was because I was off in a federal prison trying to convince my captors that the court order mandating my release was indeed genuine. This month, however, the burden of putting the newsletter together fell entirely on my shoulders.

Hope you like the *PLN*'s new format. I will occasionally experiment with different styles, trying them out until I find one or two that I like enough to call our own. Next month I will try a three column newsletter, which may be easier for you to read. Write and let me know if you have some suggestions in this regard.

Here's a nice tip for you die-hards who actually read these monthly editorial comments: Larry Goldsmith of the Prison Book Program (92 Green Street, Jamaica Plain, MA 02130) has reconditioned typewriters to give to qualifying prisoners.

Continued on page 15

Weed and Seed: The Fortress Culture

By Christian Parenti

America's inner cities are being militarized. And Operation Weed and Seed, initiated in 1991 by the Bush administration in order to subordinate social spending to the agenda of the Justice Department, lies at the heart of the assault.

Michael Zinzun of Los Angeles's Coalition Against Police Abuse puts it bluntly: "Operation Weed and Seed does nothing but further militarize our communities and criminalize our youth - criminalize an entire generation. It's this system's solution to a shortage of jobs and educational opportunities. Instead of social services, poor communities of color get collective punishment."

Many poor neighborhoods, particularly public housing projects, can now without exaggeration be compared to high-rise bantustans or, as Mike Davis so aptly put it in the pages of *Crossroads*, "strategic hamlets." In these "locked-down" communities, day-to-day life is micromanaged by the police and private security. Since Weed and Seed was launched, militarization of the country's ghettos has taken a turn for the worse. Weed and Seed, promoted as a way of providing social services, is actually a federal law enforcement program that turns ghettos into free-fire zones. So far, 20 cities including Chicago, Los Angeles, Philadelphia and Seattle are participating in this latest federal "War on Crime."

The Clinton administration has done nothing to change Operation Weed and Seed's trajectory, but is instead expanding the program to include many more cities.

Operation Weed and Seed is classic counterinsurgency, and racist to the core. It portrays urban Black and Latino youth as the enemy, dehumanizing them as not even beasts, but "weeds" in need of eradication. After the L.A. rebellions in the spring of 1992, Bush touted Weed and Seed as the centerpiece of his domestic policy. Like Guatemala's scorched earth and relocation program, "fusiles y frijoles" ("bullets and beans"), Weed and Seed operates on the dual principle of force followed by co-optation. First, federal agents and elements of the National Guard, in conjunction with local law enforcement and vaguely defined "public-private partnerships," "weed" criminals from the inner city. Theoretically, these "liberated" areas are then "seeded" with federal grants to "prevent crime's reoccurrence."

Along with receiving "intended" social service money, many targeted areas become "enterprise zones" where businesses are exempt from environmental and labor regulations. According to Weed and Seed's founder, George Bush, this will "give people who call these neighborhoods home something to hope for." In 1992 the U.S. Congress proposed \$2.5 billion in tax incentives for businesses that relocate to Weed and Seed targeted neighborhoods.

According to the Los Angeles Urban Strategies Group of the Labor/Community Strategy Center, \$500 million is designed for use in "enterprise zones." This assistance to industry is hype, enterprise zones usually employ few people. In Los Angeles less than 1,000 jobs have been created by

the city's five, much-praised "enterprise zones." Instead, these zones become little Third World enclaves of pollution, long hours, low pay and high profits.

Operation Weed and Seed offers much in the way of "herbicide," with only sparse "seeding." Even Justice Department spokesperson Mark Sackley admits, "Weed and Seed is a strategy, not a grants program." In other words, Weed and Seed is a containment policy masquerading as a grants program. Last year only 20 percent of the program's funds were earmarked for social services. The *New York Times* reports that many targeted areas, such as Chicago and Santa Ana, California, do not even have a social service component to their Weed and Seed operations. Of the money spent on social services, the Justice Department contributed only \$13.5 million in new funds. The rest of Weed and Seed's cash, totally \$500 million, was in fact "previously allotted" social service money from other departments such as Health and Human Services, Labor, and Housing and Urban Development.

Far from addressing the roots of crime, such as poverty, alienation and epidemic proliferation of guns, Weed and Seed seeks to contain crime and suppress the symptoms of an unjust social order. The primary targets of this federal war plan are unemployed Black and Latino youth whose economic prospects are so dim one needs chemical stimulants to see them amidst the smog and endless chatter about globalization and "regaining America's competitive edge." As for the "aid" received by cities participating in Weed and Seed, it

amounts to low-intensity warfare repatriated: mini police stations, federal agents combing the streets, massive paramilitary "anti-gang" and "anti-drug" sweeps, aerial and video surveillance courtesy of the National Guard and the Bureau of Alcohol, Tobacco and Firearms. In Weed and Seed-militarized housing projects such as Chicago's Cabrini Green, people live in mini-police states. All residents, much like Black people in South Africa, must show special IDs to enter their homes.

Many areas throughout the country, though not officially Weed and Seed sites are perhaps waiting to join the program, have taken their cue from the federal government and are militarizing public housing projects. Residents of these areas make no bones about feeling dispensable. "They are trying to control us, straight up," says BZ, surveying the wrought iron fence surrounding the Johnston Project in East Harlem. "That's all they want to do is herd us around. If they really wanted to stop the booming [drug dealing] they'd make some jobs and do something about the schools." Unfortunately, jobs and education only figure in the rhetoric of fighting crime. As Operation Weed and Seed shows, America's urban crisis is to be dealt with in what Franz Fanon called "the language of naked force."

Among Weed and Seed's most sinister elements is the "FAST" track prosecution system (Federal Alternatives to State Trial). This program allows for streamlined, high-velocity prosecutions and requires lengthy minimum fed-

Continued on next page

Weed And Seed (Cont.)

eral sentences for even first-time offenders busted in targeted areas. Possession of 5 grams of crack in Weed and Seed country will get someone five years in the penitentiary.

Another counterinsurgency function of Weed and Seed is the leverage it provides over community activists and grassroots development. With the Justice Department pulling purse-strings it is less likely for federal funds to slip into ungrateful hands. In Seattle, 8 of 10 social service projects proposed by the city were rejected by the Justice Department for being "soft on crime" or not having sufficient police involvement. Among these programs was a foreign language translation service.

As was indicated by Clinton's campaign pledge to put 100,000 more cops on America's streets, the Democrats have fully embraced Weed and Seed. Attorney General Janet Reno praised Weed and Seed in her confirmation hearings. According to Weed and Seed spokesperson Mark Sackley, it's been "business as usual" since the Democrats took office.

Ultimately, there is no plan to eradicate crime in the U.S. - merely a strategy to contain and manage it. Though crime has a somewhat destabilizing and delegitimizing effect on the social order, it also functions to keep oppressed people in their place by keeping them terrorized and in disarray. Crime picks up the economic slack for a system which cannot offer decent work to all and will not offer sufficient aid to those left destitute. Weed and Seed, the centerpiece of this crime management strategy, will help turn large parts of the inner city into crime pre-

serves where the "structurally unemployed" are kept out of sight, confused about the real source of oppression, busy killing one another and going to and from jail. This climate will help preempt any radical grassroots movement with a redistributive agenda.

Meanwhile, in the citadels of consumption, nicer quarters are being fortified with private security guards, sleepless video eyes and ever more exclusive types of architecture. This allows "public" police to stay on the other side of the tracks, pursuing their offensive capacity as the wardens of the locked-down ghetto. Accompanying Weed and Seed and the militarization of the urban space is the racist, get tough discourse of crime conducted in newspapers and the torrid vignettes of TV "docudramas" such as *911*. Militarism and fear are creeping into almost every aspect of city living and killing the soul of the street.

Reprinted from *Crossroads*

Disastrous Conditions in Vermont Prisons

Lawyers from the American Civil Liberties Union's National Prison Project who have just visited four Vermont Prisons announced today that they plan to extend and deepen their investigation into unconstitutional prison conditions there. Attorney Edward Koren, team member and veteran litigator in major prison conditions cases around the country, ranked Vermont's prisons among the worst he has encountered in many years. "There seem to be a number of disastrous health

and environmental issues in Vermont's facilities which are caused or exaggerated by the extreme overcrowding, but the worst problem we have encountered so far is the virtually complete lack of medical, dental or mental health care for even the most gravely ill prisoners. The denial of even rudimentary health care indicates a deliberate indifference to inmates' most basic human needs."

The team also stressed that the explosive overcrowding in Vermont's prisons is in large part caused by Department of Corrections officials and prison staff. "Prison staff has virtually unbridled power to arbitrarily force prisoners to 'max out' their sentences," said team attorney Margaret Winter. "They use this power to force hundreds of inmates into highly controversial behavior modification programs. These programs not only waste precious corrections resources, they also violate the human dignity of both prisoners and prison staff." For example, one of Vermont's so-called "self-change" programs which the ACLU team is investigating reportedly includes mandatory masturbation sessions, and mandatory recounting of sexual fantasies in group sessions of inmates, guards, and female caseworkers. Inmates are also required to view pornographic pictures while a device called the penile plethysmograph, attached to the inmate's penis and monitored by a caseworker, supposedly measures the inmate's sexual arousal. "We believe the people of Vermont will feel as much revulsion as we did when they learn what their tax dollars have been buying," said Winter.

According to team lawyer Marjorie Rifkin, the National Prison Project's inves-

tigation has prompted Corrections Commissioner John Gorczyk's recent push in the legislature for more money to open more prisons. "We see the Corrections' response as an attempt to manipulate the people of Vermont into pouring more money into an already mis-managed system," said Rifkin. "Better that the state should spend its scarce corrections resources on improvements in the delivery of desperately needed health care services."

"One way or another, we hope by negotiation but if necessary by litigation, we are committed to help bring about far-reaching change in Vermont's prisons, and we intend to move ahead quickly," said attorney Margaret Winter.

Materials on Prison Rape Survival Available

The Safer Society Program has recently produced and published a series of audio tapes made by ex-prisoners specifically for men confined in jails and prisons. Rape in prison is an important issue that has received all too little attention due to the stigmas attached to the subject. With virtually no materials available on the subject this effort meets a definite need.

The *Prisoner Rape Education Project* consists of a 27 minute audio tape emphasizing sexual assault avoidance tactics intended for use in prisoner orientation programs. *Becoming a Survivor* is a 90 minute audio tape emphasizing survival issues for victims of sexual as-

sault in prison. *Overview for Jail/Prison Administrators and Staff* is a 46 page manual for staff. All these materials are available in Spanish as well as English versions. The full set of materials is available for \$20.00 plus \$5.00 shipping from: Safer Society Press, P.O. Box 340, Brandon, VT. 05733. (802) 247-3132. Prisoners can obtain a free copy of tape 2, *Becoming a Survivor*, from: SPR, C/O ABC No Rio, 156 Rivington St. NY. NY. 10002.

Dime Down

By Bill Dunne

The lockdown at the U.S. Penitentiary at Marion, Illinois, is now a decade old. The magnitude of the decades in human experience is obvious in the marking of cultural epochs--the sixties, the fifties, the eighties. It even emerges in popular music as the definition of a long time--"... ten years has got behind you..." and "... ten years burnin' down the road..." And if ten years is a long time in the real world, imagine what it is in a repressive sarcophagus such as the control unit prison Marion has become.

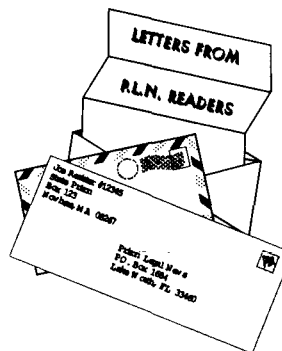
For seven years I was a shadow in the dark concrete corners of dungeon Marion, from February of 1985 to March of 1992. I learned the prison was and is an experiment in social manipulation and control that was and is carried out with zero concern for the welfare of the experimental subjects or the communities into which all but a very few of them will eventually be released. I was shown there is not even a pretense that the regimen is intended to be constructive for prisoners, though swine petulantly insist they are not guards but correctional professionals. I found that to the extent any-

one accomplishes anything positive at Marion, it is despite rather than because of the conditions and can be only a shadow of what is possible. I saw that people survive Marion, but they carry from it psycho scars and other baggage they may never transcend.

This tenth year may be the last full year of lockdown at Marion, but the lockdown is to be passed on, reputedly in the spring. The federal government has built a 484 cell lockdown mausoleum at Florence, Colorado, to which it will transfer the "mission" of Marion—for \$122,000 per cell, exclusive of exorbitant operating costs. Already transferred has been the decade long habit of official lies about control units, as evidenced by repetition of the same old, tired, discredited disinformation about who is consigned to Marion that has appeared in Southern Illinois media and in Colorado papers with respect to Florence. The new dungeon promised to be even more repressive than Marion, with virtually total isolation and for longer periods than at Marion. Public wealth was squandered on this instrument of oppression even though no evidence says Marion has fulfilled its alleged purpose and much says it has been counter-productive. And the deeper and darker the concrete corner, the looser the reign on official brutality, both active and passive.

Ten years ago, Marion was the only control unit prison in the country. Since then, at least 36 states have joined the trend to increasing repression, and the federal government has reaffirmed its commitment to perpetual lockdown with the construction of Florence ADX (Administrative Detention Lockdown Facility). Ten years of official dishon-

esty—and the failure of lockdown repression to correct—show that lockdown dungeons like Marion are a threat to everyone, regardless of how remote prison may seem to anyone's place in the struggle. Humanity should commit us to struggle against it for as much of the next ten years as may be required.



Letters From Readers

[One of the objectives of PLN is to become a forum through which readers can express opinions on what they've read, or to point out issues we should be addressing. Paul and I feel it is important for there to be a dialogue with our readers; especially around matters of disagreement. We are not above criticism, nor do we claim to have all the answers. So give us your feedback and we will print as much of it as there's space for in our letters section.]

Likes Our Follow-Up

Thanks so much for your help. *PLN* is obviously more than just a newsletter. It is very impressive that you took the initiative to write Harry Singletary (head of Florida's DOC) to let him know that the mailroom was returning my *PLN* issue because of not having the correct "housing location," in violation of state statute and my first amendment right. In fact, name and DOC number

is enough to guarantee delivery. Your letter, outside and inside grievances and litigation has overcome this huge problem. And now all mail is being delivered.

Before this, money orders and other mail were being returned to the sender, marked "insufficient address." Some prisoners found out that their senders posted mail and received it back as much as three times! What a problem. Mail is of the utmost importance to many of us inmates. I personally look forward to every day's delivery to see if I am fortunate enough to receive something.

I will continue to extol the virtues of your great publication and am encouraging more people to subscribe.

Editorial (Cont. from p. 12)

There are about seven of them left, electric and manual, and they are to be given to prisoners who are doing work for others, either prisoner rights litigation or some other form of progressive political activity on the inside. If you think you fit the bill, let Larry know what you are doing and why you need the machine. Also include any relevant restrictions that may apply to sending it in.

With this issue we start our fifth publishing year. In all of that time we have not only never missed putting out an issue, we've never even been more than a week late for a mailing. That's quite an accomplishment for a motly crew like us.

Remember that we are able to keep producing this paper each month because of your donations. Lately we have had to buy some computer-related stuff for the paper, which made our coffers low. So like the TV preacher says, keep those contributions comin' in.

Legal News

Working to Extend Democracy to All

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How to Secure the Attendance of Witnesses at Trial

By Paul Wright

Most prisoner civil rights claims are filed by prisoner litigants who are representing themselves because they either cannot afford or cannot obtain counsel to do so. They can rarely afford to pay the relevant filing fees normally required to begin litigation and thus proceed *in forma pauperis* with the court waiving the filing fees. This is permitted under 28 U.S.C. § 1915, known as the *in forma pauperis* statute. A problem that arises is when the prisoner litigant survives summary judgement and is preparing for trial. In order to secure the attendance of witnesses, especially

hostile witnesses such as DOC employees, it is necessary to serve them with a subpoena, witness and mileage fees. Which most prisoners cannot afford.

I recently faced this situation in *Wright v. Blodgett*, a civil rights suit I have been litigating since 1991. During settlement negotiations the attorney general told me there was no point in going to trial as I would be unable to present any witnesses because I could not afford to subpoena them. The practice of the Washington DOC is not to permit it's employees to appear as witnesses for prisoners unless they have been subpoenaed, knowing few if any prisoners can afford to pay such fees.

The case law in the ninth circuit as well as every other circuit that has considered this issue is that under 28 U.S.C. § 1915 the court cannot waive or pay the subpoena fee's required to compel the attendance of witnesses. See: *Dixon v. Ylst*, 990 F.2d 478 (9th Cir. 1993); *Tedder v. Odel*, 890 F.2d 210 (9th Cir. 1989); *Boring v. Kozakiewskicz*, 833 F.2d 468 (3rd Cir. 1987); *McNeil v. Lowney*, 831 F.2d 1368 (7th Cir. 1987); *Cookish v. Cunningham*, 787 F.2d 1 (1st Cir. 1986); *U.S. Marshall's Service v. Means*, 741 F.2d 1053 (8th Cir. 1984); *Johnson v. Hubbard*, 698 F.2d 286 (6th Cir. 1983) and *Malik v. Lavalley*, 994 F.2d 90 (2nd Cir. 1993).

The dissent in *Johnson* points out the obvious: that it makes little sense to allow indigents to file suit if they will be unable to present witnesses to the court or jury at the trial phase of the proceedings. As can be seen from these cases, it is a common problem for prisoners.

Federal Rule of Evidence 614(a) allows the court to call witnesses as its own. Rule 706(b) allows the court to direct the compensation by the parties of expert witnesses called by the court.

"While section 1915 does not authorize the district court's order, we conclude upon careful analysis that Federal Rules of Evidence 614(a) and 706(b), read in light of 28 U.S.C. § 1920 and 2412 (1982), and Federal Rule of Civil Procedure 54(d), confer upon the district court discretionary power to call Yellow Thunder Camp's lay and expert witnesses as the court's own witnesses and to order the government as a party to this case to advance their fee's and expenses, such advance payment to be later taxed as costs." *Means*, at 1057.

"We believe that a court may order parties to advance payment of fees and expenses for lay witnesses called by the court under federal Rule of Evidence 614(a)." "The court's power to call witnesses is crucial to prevent impairment of the fact finding process... Thus, to allow the court to call witnesses without providing some mechanism for payment of their fees and expenses would be meaningless." *Id.*, at 1058.

Relying on *Means* I filed a motion with the court requesting that the court call eight people as its own witnesses to testify in the action and to order the attorney general's office to advance the relevant witness and mileage fees. The attorney general responded that I wasn't completely indigent and that rather than save my money to pay for witness and subpoena fees I had bought groceries, "to include pizza and donuts." They also argued that the state was not a party to the suit as I was only suing one

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remaining defendant in his individual capacity and they have not yet presented their case at trial.

Magistrate Judge Hovis disagreed. He noted that while the state is not a party it is representing Mr. Blodgett and it has considerably greater resources than I do. Moreover, Mr. Blodgett has not nor will he be forced to pay the costs of litigation out of his pocket. The court noted that even prisoners have expenses. "The deciding factor for this court is that it has expended an enormous amount of time and effort with respect to the parties' dispositive motions and with respect to settlement negotiations. The court's efforts would be wasted if plaintiff were unable to call necessary witnesses at trial. Therefore, the court finds there are compelling circumstances warranting that defendant advance the fees of certain witnesses. If the defendant prevails at trial, the fees will be taxed as costs against the plaintiff." The defendants were ordered to send the court clerk the relevant amount of money for subpoena and witness fees.

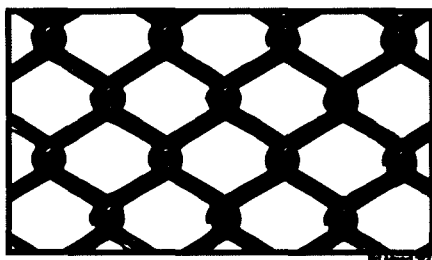
I am not aware of any other court rulings which permitted prisoners to subpoena witnesses at the defendant's expense where it was required. Magistrate Hovis' ruling is unpublished and cannot be cited as authority. Litigants facing this problem should file motions similar to the above and see if the court will grant it. A trial where the plaintiff, who has the burden of proof, cannot afford to present witnesses is hardly a fair contest.

Ninth Circuit Upholds Ban on Attorney Contact Visits

This is a class action suit filed by Arizona state prisoners. They sued on two issues. First, they contend that the Arizona DOC's policy and practice of banning all contact visits between prisoners and their attorneys at various prisons violates their right of access to the courts. Secondly, they claimed that the ban on employing HIV+ prisoners as food service employees violates 29 U.S.C. § 794 (1988). The district court entered summary judgement in the prisoners' favor on both issues in *Casey v. Lewis*, 773 F. Supp 1365 (D Az 1991).

Prison officials appealed and the court of appeals for the ninth circuit vacated in part, reversed in part and remanded.

The claims concerning the ban on employing HIV+ prisoners as food service workers was dismissed for lack of standing. None of the named plaintiffs were HIV+ nor had they sought nor been denied employment for being HIV+. Thus, none of plaintiffs had suffered injury in fact and lacked standing to challenge the disputed policy because they had not been subjected to it. This was remanded to the district court with instructions to dismiss.



The Arizona DOC ban on attorney contact visits affects prisoners housed in the Alhambra reception center awaiting classification, prisoners in cell block 6 at the prison in Florence, prisoners in the Special Management Unit also at Florence and prisoners in lockdown at other facilities. At those facilities visiting consists of placing the prisoner in a caged area separated from his attorney by a cinder block and glass partition. Communication takes place by phone. Documents are exchanged through a mail slot or in some facilities by giving them to a guard. The district court found that these arrangements violate the prisoners right of access to the courts and are unconstitutional. In *Ching v. Lewis*, 895 F.2d 608 (9th Cir.

1990) the appeals court had ruled that the right of access to the courts includes contact visits with attorneys.

The defendants in this case claim that the policy is designed to prevent the smuggling of contraband into prisons and to protect prisoners, staff and the general public from assaults, hostage taking and escape. The district court held this was insufficient because the defendants had not pointed to a single instance where such an incident had occurred as a result of contact visits between attorneys and prisoners. The appeals court held this was error. It held prison officials need only show that the justifications "invoked" by the policy are served by it. The fact that the policy allows contact visits with family members did not undermine the ban on contact visits with counsel.

The court held that the prisoners had not shown that they had been denied access to the courts by this policy. Rather than remand the case back to the district court to determine if the prisoners' right of court access was satisfied by access to law libraries and such, the appeals court made that decision itself.

The court's opinion in this case is seven pages long. The dissent by judge Pregerson is sixteen. The dissent notes that this ruling "sets back our constitutional jurisprudence fifty years." In a detailed and exhaustive opinion judge Pregerson explains why as a matter of law and fact, the prisoner plaintiffs were entitled to judgement in their favor, as the district court ruled. He notes that this essentially guts the *Turner* standard of being anything more than a rubber stamp for unconstitutional prison rules and policies. This decision joins many others that are rolling back what had been considered well established prisoner rights. See: *Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993).

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Murder Incorporated

By Bill Dunne

The U.S. Bureau of Prisons recently designated the U.S. penitentiary at Terre Haute, Indiana, as the facility at which prisoners sentenced to death by the federal courts will be housed until they are executed by lethal injection. The federal government has never previously maintained a death row. Federal executions were formerly carried out at state facilities, the official murder of Julius and Ethel Rosenberg in Sing Sing, New York, in 1953, being a case in point. The last federal execution was in 1962 in Iowa. There are currently five prisoners under federal sentence of death, all pursuant to the drug kingpin law.

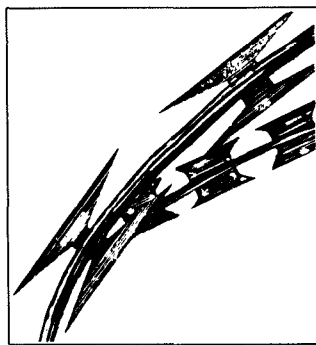
USP Terre Haute staff have been moving rapidly to implement the death designation. D unit, a block at the west end of the prison with approximately 60 double cells has been emptied and is being modified to serve as death row. Associate Warden Bledsoe opined that we would "see something in six to nine months." When asked why such a large unit was necessary with only five federal death sentences outstanding, Associate Warden Edenfield said they were just planning for the future. Warden Keohane claimed the death row had been imposed upon Terre Haute rather than solicited by him as a source of revenue and notoriety. The decision to establish a federal deathhouse could only have emanated from Clinton's Oval office, given it's unprecedented nature. Keohane characterized the project as a humanitarian one intended to prevent prospective federal execution victims from being exposed to possibly substandard conditions on state death rows. Such solicitude!

Prisoners awaiting execution will be housed in the former D block, but the actual murder will be perpetrated in a facility to be built outside and connected to the block by a tunnel through or under the perimeter fence. The unit will purportedly be operated by an entirely separate staff that will not work the "mainline" pursuant to the regular quarterly staff rotations. Whether the killing ground will include a separate

SORT (Special Operations Response Team) squad to drag out prisoners reluctant to die is unclear. USP Terre Haute security is already being beefed up in the wake of the designation with three new gun towers under construction.

No one who knows will say why Terre Haute was selected for this ultimate in official violation of human rights. Rumor is that the choice was narrowed to this joint and USP Leavenworth and Terre Haute won because Indiana is a more steadfastly death penalty state. Verily, a local media poll found that 93% of locals were okay with having the federal murder mill here, a number that seems even higher than among the swine. Speculations that the lockdown dungeon at Marion or the one being built at Florence, Colorado, were not selected for the function because they already take enough heat for human rights abuses and doing official killing elsewhere would perhaps divert and at least not increase it. It would also likely have been difficult and time consuming to push an appropriations bill for a stand alone death prison through congress.

With great fanfare, president Clinton announced his new crime plan on August 10, 1993, at the White House. A centerpiece of the package is an expansion to 47 of the crimes for which one may receive a federal death penalty. Included also are limitations on the appeals available to persons under sentence of death. Given Clinton's propensity to kill for power demonstrated by his presidential campaign executions as governor of Arkansas, the establishment of a federal death row can only be an ominous development. With appeal limitations it is likely that Clinton will have at least a handful of victims to sacrifice on the alter of the public opinion polls by the '96 election run off. With them he will inaugurate a reign of full service federal repression.



Qualified Immunity Law Clarified

Joseph Rankin was a pre-trial detainee in the Harris County, Texas, jail. While awaiting a court appearance in a large holding cell a disturbance broke out after female prisoners passed in front of the cell. A deputy sheriff removed Rankin from the cell and, according to Rankin's complaint, placed him in a "compliance hold," slammed him against a wall and floor, handcuffed him and stomped on his back and legs. Rankin suffered injuries to his knee, throat and a finger. Rankin then filed suit under § 1983 contending that the beating violated his constitutional rights.

The defendant jail officials sought summary judgement on the grounds that they did not use excessive force and even if they did, they were entitled to qualified immunity because Rankin had not alleged a significant injury which was the legal requirement for excessive force claims at the time the beating took place. The district court denied the motion and the defendants filed an interlocutory appeal.

The court of appeals for the fifth circuit ruled that the district court had erred in applying the Supreme Court's ruling in *Hudson v. McMillian*, 112 S.Ct. 995 (1992), to the second prong of the inquiry into the defendants' qualified immunity defense. The court remanded the case for further proceedings.

The court notes that in assessing claims for qualified immunity a bifurcated analysis takes place. First, the court must determine if the plaintiff has alleged the violation of a clearly established constitutional right. If so, the court must then determine if the defendants' conduct was objectively reasonable as government officials are entitled to qualified immunity even if they do violate constitutional rights so long as their conduct is objectively reasonable.

Cases alleging excessive use of force by pre-trial detainees are evaluated under the fourteenth amendment's due process clause while those brought by convicted prisoners are evaluated under the eighth amendment's ban on cruel and unusual punishment. The court held that it is appropriate to use the case law from both areas in analyzing pre-trial

detainees' excessive force claims because it is impractical to draw a line between convicted prisoners and pre-trial detainees. Thus, the Supreme Court's rulings in *Hudson* and *Whitley v. Albers*, 475 US 312, 106 S.Ct. 1078 (1986), which are eighth amendment cases involving convicted prisoners, can be applied to pre-trial detainees' excessive force claims. The court cited many fifth circuit excessive force claims against both prisoners and detainees.

To determine whether a plaintiff has stated a constitutional claim the court must look to current constitutional standards. But to determine the objective reasonableness of the defendant's actions in analyzing qualified immunity defenses the courts must apply the law in effect at the time of the constitutional violation. In this case the standard for excessive force cases was *Schillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981). This case was largely overruled by the Supreme Court's *Hudson* ruling. "We are not unmindful that the bifurcated qualified immunity analysis leads to a somewhat schizophrenic approach; i.e. the application of *Hudson* to the question of constitutional violation coupled with the application of *Schillingford* to the objective reasonableness question, even though *Hudson* jettisoned *Schillingford*'s severe injury element. Nevertheless, this is the proper framework to apply."

The court held that there were numerous factual issues in dispute which prevented the case from being resolved at summary judgement. A trial was necessary to determine what had actually happened as well the actual extent of Rankin's injuries. See: *Rankin v.*

Shackling of Con Litigants Discussed

Joe Woods is an Illinois state prisoner. He sued prison officials claiming his eighth amendment rights were violated when they did not feed him for two days during a lockdown. A jury ruled in favor of the prison official defendants. Woods appealed claiming that the appearance of his prisoner witnesses in prison clothes and arm and leg restraints prejudiced his case and denied him a fair trial. The court of appeals for the 7th circuit affirmed.

The court lists numerous instances where courthouse personnel have been killed or wounded in courtroom and law firm attacks, including some involving criminal defendants in the court where this trial was held. Noting that in *Illinois v. Allen*, 397 US 337, 90 S.Ct. 1057 (1970) the Supreme Court upheld the shackling of criminal defendants, the court notes there is nothing to prevent a trial court from taking steps to restrain potentially disruptive prisoners, witnesses or anyone else in the court room.

Readers should note that in this case the plaintiff, Woods, appeared in civilian clothes throughout the trial and was not shackled. He claims that the restraints and prison clothing on his witnesses undermined their credibility.

The court outlines the balancing test to be employed by courts to maintain courtroom security and to minimize prejudice to the plaintiffs. *Lemons v. Skidmore* 985 F.2d 354 (7th Cir. 1993) held that prisoner plaintiffs and their witnesses should not be shackled except in case of "extreme need." The type of case involved will also affect the potential prejudice a party may suffer if restraints are used. The court notes that *Lemons* was reversed for a new trial because it involved an excessive force case and the plaintiff's propensity to violence was at issue.

Balancing of the interests involved, prejudice to the prisoner versus security and escape risk, is best achieved after the problem is timely raised by the defendant prison officials and the court holds a hearing outside the jury's presence to determine what threat, if any, is posed by the individual prisoner (plaintiff or witness) to courtroom security as well as his risk of flight. At the hearing, the court may rely on sources including, but not limited to: prisoner records, witnesses, prison and/or law enforcement officers and the federal marshals. "While the court may rely 'heavily' on the marshals in evaluating the appropriate security measures to take with a given prisoner, the court bears the ultimate responsibility for that determination and may not delegate the decision to shackle an inmate to the marshals."

If the court determines that the prisoner does pose a risk, after the hearing, he may order use of restraints but at the same time must attempt to prevent the jury from viewing the restraints. The court also approved the use of curative or limiting instructions to the jury instructing them to disregard the restraints when assessing the witnesses' testimony.

Noting that in this case the jury would be aware that the witnesses were prisoners because of the nature of the suit, i.e. a prison civil rights case, there was no danger of prejudice to the plaintiff if his witnesses appeared in prison clothes. See: *Woods v. Thieret*, 5 F.3d 244 (7th Cir. 1993).

California DOC Starts Use of Electric Fence

On November 8, 1993, guards threw the switch on an electric fence surrounding the maximum security prison at Calipatria, CA. The \$1.5 million fence stands 13 feet high, erected in a no man's land between two 12 foot fences topped with razor wire so that no one touches it accidentally. It carries 4,000 volts and 650 milliamperes. About 70 milliamperes is enough to kill a person.

As many as 20 other California state prisons will get electric fences in upcoming years. The California DOC estimates the fences could save the state \$34 million a year by reducing the number of tower guards. They did not disclose how much it costs to operate and maintain the electric fence.

"The fence doesn't get distracted, it doesn't look away for a moment and it doesn't get tired," Warden K.W. Prunty was quoted as saying, "We already had a lethal perimeter. This is simply a way to keep that same level of security while saving money."

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Reviews

By Paul Wright

Jail Suicide Update is a quarterly newsletter published by the National Center on Institutions and Alternatives. While focusing primarily on suicide prevention in jails its information is useful for prison administrators seeking to prevent suicides in prison as well as attorneys litigating custodial suicides. The most recent issue had articles on the suicide prevention programs at the North Brunswick, NJ, jail and Marion County, OR, jail. The articles, written by jail staff, emphasize the need for proper policies and critical administrative reviews of policies and practices. Each issue also carries updates on court decisions affecting this issue. The NCIA also has other materials on jail suicide prevention available. For more information contact: Lindsay Hayes, Project Director, NCIA, 40 Lantern Lane, Mansfield, MA. 02048. (508) 337-8806.

Mothers Against Police Harassment Newsletter is a monthly newsletter published by this group, the MAPH. The MAPH is a grassroots Seattle community organization which is dedicated to combatting police abuse and harassment of citizens. They monitor complaints against police and distribute educational materials informing citizens of their rights when confronted by police. They also hold educational workshops for youth and immigrants. There are many groups similar to MAPH across the US but this is the only one in Washington. For more information contact: MAPH, P.O. Box 22886, Seattle, WA. 98122. (206) 329-2033.

Letters From Exile is a collection of the writings of U.S. political Prisoner Of War Raymond Luc Levasseur from the maximum security lockdown prison at Marion, IL. The booklet is 72 pages long and produced by mimeograph. Powerfully written, they detail Ray's long struggle against imperialism and the corporate war machine, his burial inside the prison system because of his political beliefs, his views and analysis of current events like the Los Angeles Rebellion, the pardon of the Iran-Contra war criminals, control units and more. This helps expose the lie that there are no political prisoners in the United States. Copies are available for

\$3.00 for 1, \$25.00 for 10 and \$45.00 for 20. Write: Friends of Political Prisoners, P.O. Box 3113, Madison, WI. 53704.

Arm the Spirit Info Bulletin is a monthly newsletter which covers news and developments of various liberation struggles around the world; in many cases the sole source of this information in English. Recent issues have covered anti-fascist organizing in Canada and Germany, the Kurdish liberation struggle, a lot of news on the clandestine resistance in Germany and developments with the Red Army Faction, police attacks in Denmark and France and a lot more. They also cover struggle by political prisoners around the world, including the U.S., and anti-control unit efforts. Subscriptions are \$12.00 a year, due to financial problems no free subs to prisoners. Write: ATS, P.O. Box 1242, Burlington, VT. 05402-1242.

Freedom Talk is the newsletter of the Freedom Now Network. The network consists of various organizations in the San Francisco Bay area who advocate for human and prisoner rights and the release of activists imprisoned as a result of political repression in the United States. Many of the groups represented are the defense committees for individual prisoners. Their first issue had an article about *PLN* co-editor, Ed Mead's release from prison after 18 years, so you know it can't be all bad! I will duly note that they confused *PLN* with *Prison News Service*, but aside from that it's an informative bulletin. Subscriptions are available for a donation. Write: FNN, 3543 18th St. Box 12, San Francisco, CA. 94110.

Samed: Palestinian Prison Voices is the monthly newsletter of the Mandela Institute for Political Prisoners. It provides detailed news and information about the status of political prisoners held by the Israeli government, including conditions of confinement, the widespread, systematic use of torture against the prisoners, struggle by the prisoners and more. The best source of information on this specific topic that I've seen to date. Subscriptions are available for a donation from: P.O. Box 19543, Jerusalem, via Israel.

F.E.A.R. Chronicles is the bi-monthly newsletter of the Forfeiture Endangers American Rights (FEAR). FEAR is a non profit group which actively opposes the property forfeiture

laws passed by Congress and many states as part of the "War on Drugs". These laws permit the government to seize, without compensation, property alleged by the government to be used in a crime or bought with the proceeds of crime. In most cases criminal charges are never brought against the property owner and the government instead seizes the property and leaves it to the owner to contest the propriety of the seizure. FEAR has chapters in several states and is growing. Their newsletter focuses on legal developments, lobbying and other actions taken to change these laws. Contact: FEAR, P.O. Box 5424, Somerset, NJ. 08875-5424.

ROP Legal Journal is the newsletter of the National Lawyers Guild Prison Law project. Just getting started again after a long hiatus, the Journal has focused on issues of interest to prisoners starting out in litigation, such as using a law library, the writ of habeas corpus and such. Subscriptions are \$7.50 a year to: Prison Law Project of the NLG, 558 Capp St. San Francisco, CA. 94104.

The Philippine Compass is a quarterly newsletter produced by U.S. supporters of the Communist Party of the Philippines and the New People's Army. This is the best source of information about developments concerning the CPP and their struggle to overthrow the U.S. client regime in the Philippines. Recent issues have had interviews with Jose Maria Sison, the CPP chairman, former political prisoners, women militants as well as ideological positions held by the party. Subscriptions are available for a donation, write: Philippine Compass, P.O. Box 21083, PACC, New York, NY. 10129.

Captive Voice is a quarterly magazine written by Irish Republican Prisoners of War held throughout Europe and the U.S., it is published by Sein Fein's POW department. Each issue contains articles on news, analysis and history, artwork, poetry, prison conditions and the struggle within and outside the prisons. The British government, like all the other imperialist powers, maintains that it holds no political prisoners. *Captive Voice* helps to dispel this myth by giving the prisoners themselves a voice and clearly articulating the Irish people's desire to an end to British occupation. Subscriptions cost \$20.00 a year in the U.S. from: An Glor Gafa, C/O

INAC National Office, 4951 Broadway, New York, NY. 10034.

Prison News Service is a bi-monthly tabloid paper that is a great complement to *PLN*. This is one of the best prison papers around which covers not only prison news from around the world but also native American and other issues as well. *PNS* routinely covers political prisoner/prisoner of war issues in the U.S. and other imperialist countries. This is highly recommended, if you read *PLN* you should read *PNS* as well. Subscriptions are free to prisoners, \$10.00 a year to others. Write: *PNS*, P.O. Box 5052, Station A, Toronto, Ont. M5W 1W4, Canada

Estate Proper Party When Defendant Dies

Jerry Young is a New York state prisoner. He filed suit under § 1983 claiming that Terry Patrice, a prison guard, had beaten him. During the pendency of the suit it appears that Patrice died. The attorney general filed a motion to dismiss the suit claiming that because the sole defendant had died the case was moot and no cause of action remained.

The district court denied the motion by noting that because the suit was against Patrice in his individual capacity it did not become moot upon his death. Instead, the proper procedure under Fed.R.Civ.P. 25 (a)(1) is to substitute the defendants' estate as a party. The court also ruled that the statement of death submitted by the AG was insufficient because Rule 25 requires that when a party dies during a suit their counsel must submit a statement of death within 90 days which requires the naming of the executors of the estate. The purpose of this requirement is to permit the action to continue until it is resolved.

Suits against officials in their official capacity are different. In those cases Rule 25 (d)(1) requires that the official's successor in office be named as a substitute party. The court notes the distinction between "parties" themselves and "successors or representatives of deceased parties." See: *Young v. Patrice*, 832 F. Supp 721 (SD NY. 1993).

Delay of Medical Care States Claim

Willie Harris was a pre-trial detainee in the Coweta County, Georgia, jail. When he was arrested his hand was injured by tight handcuffs. Upon arrival at the jail, on September 6, 1990, he requested treatment for the injury. He was seen by the jail nurse on September 28 and later by the doctor who recommended a nerve conduction study. In November Harris requested medical attention for his hand which was now curled up and unusable. Upon being taken to the local hospital emergency room, the treating doctor called the sheriff's office and told them Harris required treatment and surgery. Unable to make bond Harris remained in jail and received no treatment or surgery. On March 11, 1991, he received the needed surgery, after he had been transferred to the state prison system.



Harris filed suit under § 1983 claiming that the delay of necessary medical care by the sheriff violated his eighth amendment rights by showing deliberate indifference to his medical needs. The jail defendants sought summary judgement on grounds of qualified immunity for their actions which the district court denied. The defendants filed an interlocutory appeal which the court of appeals for the eleventh circuit denied.

The appeals court held that prisoners and pre-trial detainees have a well established right to prompt medical treatment. The issue in this case was whether the sheriff had violated that right. Because there were factual issues in dispute the court held that summary judgement was not proper. A trial was necessary to determine when the sheriff knew Harris needed medical help and what he did upon learning of Harris' medical problems. If Harris' allegations are true then the sheriff is not entitled to qualified immunity. See: *Harris v. Coweta County*, 5 F.3d 507 (11th Cir. 1993).

Officials Must Assess Informant's Credibility

Kevin Richardson is a New York state prisoner. In 1985 he was incarcerated for allegedly stabbing James Caroline, another prisoner. At the disciplinary hearing Caroline submitted a statement on Richardson's behalf stating that Richardson was not the assailant. The hearing officer heard testimony, outside of Richardson's presence, from other prison officials that Caroline and other prisoners had identified Richardson as the assailant. The hearing board found Richardson guilty of the infraction and sentenced him to one year in segregation and one year's loss of good time. The finding and sanction were upheld on administrative appeal.

Richardson then filed a writ of habeas corpus in state court which was granted. The state court ruled that the hearing officer had no basis upon which to evaluate the credibility of the informants against Richardson and this violated due process. The court vacated the disciplinary finding and ordered it expunged from all prison files.

Richardson filed suit in federal court pursuant to § 1983 seeking monetary damages, attorney fees and costs. The district court granted the defendants motion for summary judgement by holding that because Caroline was able to identify his assailant there was sufficient evidence in the record to uphold the infraction. The second circuit court of appeals affirmed but on different grounds.

The appeals court gave an extensive discussion of the relevant case law concerning the use of confidential informants at prison disciplinary hearings. The circuit courts that have considered the question have all held that the hearing officer must make an independent assessment of the informant's credibility and reliability before they can rely on it in the disciplinary process.

However, the court noted, until now the second circuit had not addressed this issue. The court affirmed dismissal of the suit on grounds of qualified immunity. It held that in 1985 reasonable prison officials would not have been aware that by not independently assess-

ing informants credibility and reliability they would be violating due process.

With this case the law on this issue is clearly established in the second circuit. "...as *Zavaro* implied, there must be some evidence in the record of the informants reliability." "One means of satisfying this standard is for prison officials contemporaneously and independently to assess the credibility of the informants, and to create and preserve a record of that assessment... Such a record should be available for administrative or judicial review to insure that the conclusion reached by prison disciplinary officials satisfies due process." See: *Richardson v. Selsky*, 5 F.3d 616 (2nd Cir. 1993).

No Right to TV Interviews

Walter Johnson is a Kansas state prisoner. The television news program *Hard Copy* sought to conduct a face-to-face interview with Johnson. Johnson had communicated with the program by phone and mail. After initially being denied access to the prison, *Hard Copy* reiterated its request in a letter which prison officials again denied. Prison officials claimed that such interviews were disruptive to the operation of the prison. Johnson filed suit under section 1983 claiming that the denial of access to be interviewed by *Hard Copy* violated his first, eighth and fourteenth amendment rights. The district court dismissed the suit and the court of appeals for the tenth circuit affirmed.

The appeals court notes that the Supreme Court has long held that the news media has no right to personally interview prisoners, *Pell v. Procunier*, 417 US 817, 94 S.Ct. 2800 (1974) and *Saxbe v. Washington Post*, 417 US 843, 94 S.Ct. 2811 (1974). Moreover, Johnson lacked standing to assert the first amendment rights of *Hard Copy*.

Prisoners too have no right of in-person access to the news media, *Seattle-Tacoma Newspaper Guild Local #82 v. Parker*, 480 F.2d 1062 (9th Cir. 1973). Denying media access to conduct face-to-face interviews is constitutional as long as other alternative means for communicating with the media are available. In this case, Johnson was able to use the mail and phone. See: *Johnson v. Stephan*, 6 F.3d 691 (10th Cir. 1993).

Prisoner Entitled To Interest From Prison Account

Lester Tellis is a Nevada state prisoner. He requested that prison officials credit his personal property account with the interest actually earned on those funds. The officials refused, claiming that Nevada Revised Statute 209.241 grants the Director of Prisons authority to use interest earned on prisoners' personal accounts at the directors discretion.

Tellis filed suit under § 1983 claiming that the refusal to credit his account with the interest it had earned constituted a seizure of his property without due process in violation of the fifth and fourteenth amendments. The district court granted summary judgement to the defendants, holding Tellis had failed to establish a protected property interest in the interest earned by his funds. The U.S. court of appeals for the ninth circuit disagreed and reversed the lower court.

The statute in question, NRS 209.241 states in relevant part: "1. The director may accept money, including the net amount of any wages earned during the incarceration of an offender after any deductions made by the director, and valuables belonging to an offender at the time of his incarceration or afterward received by gift, inheritance or the like, or earned during the incarceration of the offender and shall deposit the money in the prisoners' personal property fund which is hereby created as a trust fund." "3. The interest and income earned on the money in the fund, after deducting any applicable charges, must be credited to the fund."

The appeals court held that the mandatory language of subsection 3, requiring that interest be credited to the prisoner's fund, creates a protected property interest in such interest. The court rejected the defendant's argument that they could do what they pleased with the interest by holding "The requirement to credit interest and income earned to that fund would be meaningless in practical effect if we construe the section to authorize the director to spend that money at his discretion."

Because the legislature, in other sections of Chapter 209, expressly authorizes prison officials to expend the funds and the interest earned on the funds under certain circumstances, the court ruled that the legislature would have expressly authorized the expenditure of interest earned on prisoners' personal funds if it had so intended.

"The plain language of this section, read in the context of the entire statute, does create a protected property interest in interest and income actually earned on money deposited in the prisoners' personal property fund. As such, the director's failure to credit Tellis's account with interest earned on his funds violates Tellis's due process rights." The court applied *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 US 155, 101 S.Ct. 446 (1980) which held that "The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." See: *Tellis v. Godinez*, 5 F.3d 1314 (9 Cir. 1993).

Loved One in Prison?

As a writer and spouse of an incarcerated man, I am putting together a book to help people deal with the problems involved in having a loved one in prison. Through the initial detainment, trial, jail time and resulting imprisonment, the family on the outside first goes through shock and denial, but must, finally, come to the reality of the daily struggle to survive outside, provide for their family and to maintain relations with their loved one in prison while facing the yawning years ahead. How do they do it?

I hope to provide them some answers as how others have done it before them. My book will be edited from anonymous questionnaires and personal interviews to combine the coping techniques of hundreds of individuals. I need to reach as many of those already with experience in this. To obtain questionnaires or more information, write:

Coping
268 Bush Street
Box 3125
San Francisco, CA 94104

Class Differences in Crime Control

By Ed Mead

The other day a prisoner at a women's prison wrote and asked me how we, as revolutionaries, would handle crime problems differently than the existing government is now doing. The biggest difference would be both a social and an economic one, as the problem itself is both social and economic. First of all, there would be no unemployment, and things like jobs, education and decent health care would be human rights. By eliminating the existing gap between rich and poor, much of the social roots of crime would be eliminated (particularly for economic crimes, like robbery, burglary and so on). Even then we would, of course, still have ideology-based social offenses, such as sex crimes. It will be possible to reduce these when the means of education and information are in the hands of a party representing the interests of the working class. Then women won't be portrayed as little more than sex objects for male pleasure. Some of these changes will of course require a generation or two to alter the thinking and consciousness of a whole society. There is no shortcut or easy solution to this problem, yet it can be solved.

What about those already in prison? There are two ways to approach the science of social control. One is from above and the other from below. Take littering, for example. You can impose large fines and other penalties against those who litter. This process can continue until it becomes a capital offense. That is the bourgeois approach; it is also the approach of most citizens and many prisoners too. They say "kill the child molester!" They don't understand that they will quite likely be next on the government's list of those to be murdered by the state. The top-down way of thinking relies on the application of more and more force, up to, and including, death. As revolutionaries our approach would be different. If people litter it is because their consciousness is at fault. They do not believe that the earth belongs to them, so they litter. They are alienated not only from the process of production, but from the planet as well. We, on the other hand, would make the earth theirs. Today most of the planet belongs to multi-national corporations or governments. They pollute everything they touch, yet expect us to be different. Similarly, child molesters and other sex offenders suffer an identical lack of consciousness. Reeducation would teach them that women and children are not mere objects placed here for them to masturbate into. They learn this by not only becoming conscious of the nature and manifestations of sexism, but also by actively combating sexism in their day to day life. In other words, they must become active participants in the ongoing fight against the oppression of women and children.

Television, movies, magazines, newspapers, schools, and so on all put out the message that white males run the world and that everyone else is there to serve them (of course it is rich white males who do this the most). The ruling class puts forward the notion that all we need is more of what has not worked in the past: more prisons, more time behind bars, more death penalty, etc. And the hapless dupes of that consciousness pass it on as a legitimate solution to pressing social ills.

There can be no criminal justice without social justice. That truth should be self-evident. It should be equally clear that social justice is not achieved through a government's increasing use of repression and violence against its own people. As revolutionaries we would approach the problem of crime from the bottom up, not from the top down.

27 Cons Die in El Salvador Riot

On November 19, 1993, prisoners at the San Francisco Javier prison in eastern El Salvador rioted. The four hour battle between rival gangs left 27 prisoners dead and thirty wounded; they were hacked, beaten or burned to death. Autopsy reports showed the victims had high levels of marijuana, tranquilizers and alcohol in their systems. The battle began over an effort between prison gangs to control the drug flow within the maximum security prison. The prison has an official capacity of 200 but actually holds 307 prisoners and is staffed by 27 prison employees who do little more than control the outer perimeter.

More Censorship and Repression in Indiana

On November 7, 1993, guards at the Maximum Control Complex (MCC) in Westville, Indiana, searched the cell of Shaka Shakur seeking to confiscate all copies of *Human Rights Held Hostage*, a civil/human rights publication. Not finding any copies they searched the other cells in the section. Still not finding any copies they locked down the entire MCC and shook it down. This time all typed political essays and even the back issues of *HRHH* were confiscated by the administration.

Guards also confiscated personal writings and legal materials from Shakur. So far none of the prisoners have been given any kind of notice concerning the confiscation. The orders to confiscate *HRHH* were apparently given by the Indiana DOC Deputy Commissioner, John Nunn. The report *PLN* received was written shortly after the above events, but it appears that the shakedown for *HRHH* was statewide and not just confined to the MCC.

The prisoners are initiating legal action for the confiscation of the materials based on its political content, long after the publications had been permitted to enter the prison system. They are seeking assistance from counsel due to the difficulties in conducting litigation from a control unit under these types of conditions. Obviously if the DOC gets away with its ruthless crushing of one prisoner rights publication like *HRHH*, then it opens the way for the repression of other publications, including the one you are currently reading.

To protest the confiscation of *HRHH* contact: Christian Debruyne, I.D.O.C. Commissioner, 804 State Office Bldg. 100 North Senate Ave. Indianapolis, IN. 46204. Phone (317) 232-5715.

For more information or to receive a copy of *HRHH*, contact:

Committee for Freedom
P.O. Box 14075

Chicago, IL. 60614-0075

Shaka's address is:

Shaka Shakur #28443

P.O. Box 557, M.C.C.

Westville, IN. 46391-0557

What's Wrong in the Ohio DOC?

By John Perotti

It's been almost a year since the end of the siege at Lucasville. During this time investigations have been conducted by the State Legislature, State Highway Patrol and Scioto County Prosecutor's Office. The mass media has focused on "crimes" committed during the riot rather than on the problems which caused such drastic measures. Although there have been some articles on the overcrowding in Ohio prisons, which causes understaffing, increased tensions, lack of programs and jobs for prisoners, this is but one factor. The main issue which caused the drastic action was the religious suppression of the Muslims. Ohio lacks training in cultural and religious awareness for its guards, as well as interpersonal relations

During my confinement at the Southern Ohio Correctional Facility (SOCF) in Lucasville the minister showed great partiality towards the Christians and baptists and open disdain towards Muslims and other faiths. The guards openly disrespected Muslims in particular and blacks in general. Combine this with a warden who ruled his way or no way at all and unrest was bound to occur. The guard's union has called for training in cultural and religious awareness, as well as the hiring of more guards. The state budget has allocated enough money to hire 912 new guards.

As long as the criminal injustice system continues to hand out extraordinarily long sentences and the parole board continues to deny paroles to Ohio prisoners, overcrowding along with the problems that accompany it will continue. Most Ohio prisons are accredited by the American Correctional Association (ACA) whose standards are widely referred to by many U.S. district courts. However, ACA standards call for single-celling in all close, maximum and most medium security prisons. The only single cells in Ohio are in Administrative (AC) and Local Control (LC) which, contrary to prisonrats assertions, are punitive in nature.

Here at the Mansfield Correctional Institution (MANCI) even AC and LC are double celled. When Lucasville sent the 129 prisoners from the riot to

MANCI they were all classified as AC and have been housed two per cell since. This is something not even done at Lucasville and is forbidden by the holdings of *Rhodes v. Chapman*, the leading double celling case from the U.S. Supreme Court which arose from Lucasville. Mr. Laufman, the plaintiff's attorney in *White v. Morris*, the federal suit requiring integrated celling at Lucasville, attempted to obtain a court order seeking single celling of all Lucasville cells since violence resulted from forced integration. The district court refused to do so but suspended forced integration until February 1, 1994, by which time the state promised to "have it's house in order." The prisoners at Lucasville, except for a small portion, are still locked down two to a cell under "security control" status "pending investigation." Information received states that some criminal indictments will be issued within the next 60 days.

The 129 prisoners transferred to MANCI will be the scapegoats. They were placed in AC under the auspices of "you were self identified as a member of one of the three groups that had control of the guard hostages." The only self identification came from the officials in charge of the surrender, not the prisoners themselves. The state claims that all these prisoners are either Muslims, Black Gangster Disciples or Aryan Brotherhood, when in fact, this is a falsehood perpetrated by the Department of Corrections. Some were merely in the last group to exit the building, later directed to sit in the bleachers with those identified as such.

The treatment they are receiving here is rife with the same repression and racism as at Lucasville. The food is issued in small portions, left to sit until it gets cold. Access to the law library is denied. Mail is stolen or censored. Hygiene articles and cell cleaning supplies are often withheld. Recreation denied and men are housed two to a cell, twenty four hours a day, seven days a week, 365 days a year, with only writing paper, pencil and limited personal reading material. Some are permitted radios.

When some of the Muslims protested being denied pork substitutes, by beating on their doors, the "Ninja Turtle" SWAT team was called in, complete with shotguns and teargas canisters. The block was surrounded as the prisoners involved were physically beaten and then transferred to other prisons. This is the mentality at MANCI. All of the unit 5 control unit is filled up with AC's and the mental health unit "Lynx Program" pod had to be moved in order to house security control and detention cell prisoners.

Because Ohio refuses to use the interstate compact to transfer prisoners to other states so that they can eventually be released into general population, all that those involved in the Lucasville takeover will have to look forward to is years of lockdown. It is unlikely that the state will release any of these prisoners into general population here. Why does Ohio enter into a compact when it refuses to use it except in rare PC cases or until pressured to do so? This is a question that the state should be made to answer.

On other fronts. In August, 1993, prisoner Roy Slider was brought to trial for the attempted murder of deceased MANCI guard Tom Davis. Slider self admitted to stabbing Davis once and beating him with a combination lock. While Davis was being treated at an outside hospital he died as a result of a steroid overdose caused by hospital negligence. When the coroner ruled as such, a grand jury refused to indict Slider for aggravated murder, opting instead for attempted murder charges. A jury found Slider not guilty of attempted murder but guilty of felonious assault. This brought a massive outcry from the guard's union, NAACP and Governor Voinavitch who has called for a committee to look into stiffer penalties for prisoner on guard attacks, but not into the possibility that some guards have attitudes too.

As long as society continues to refuse to treat the roots of the problem, you can expect to read about more uprisings everywhere, as they are inevitable.

Involuntary PC Violates Due Process

Gregory Howard is a Michigan state prisoner. Howard was a prisoner at the state prison in Jackson when he requested placement into protective custody (PC) for protection from asserted enemies in the general prison population. He was transferred to a close custody prison for a psychiatric evaluation and placed in general population. A few weeks later he was transferred to a maximum security prison and placed in protective custody. At no time did Howard receive notice or a hearing concerning the transfers nor placement back into protective custody. The transfer to the maximum security prison was a mistake and he was transferred back to Jackson and again placed in protective custody without any type of hearing or notice. Shortly after his return to Jackson, Howard indicated a desire to return to general population and on December 21, 1986, the deputy warden at the prison concurred with the recommendation that Howard be released to general population. Despite bi-monthly status reports indicating this, Howard remained in PC during his entire stay at Jackson until March 3, 1988. Howard filed suit under § 1983 claiming that the repeated refusal by prison officials to release him from PC violated his due process rights. The district court dismissed the suit finding that prisoners have no liberty interest to remain in or out of PC or general population. The court of appeals for the sixth circuit reversed and remanded.

The appeals court notes that prisoners have no federal constitutional right to remain in general population. However, such rights can be created by the states. The court examined Michigan Administrative Code (MAC) Rule 791.4401 which governs the security level classifications of Michigan state prisoners and found that the rule does in fact create a liberty interest which can be enforced in federal court under § 1983. "Accordingly, an increase in plaintiff's security level classification level without notice and hearing could, under certain circumstances, constitute

a violation of plaintiff's liberty interests."

The appeals court found that Howard's transfer without notice or hearing to the maximum custody prison was in violation of Michigan DOC regulations. It also found the lower court's finding that the transfer had been made for medical reasons, which would have eliminated the need for the hearing and notice, to be erroneous.

The district court had also concluded that Howard had no real desire to be released to the general population. The appeals court found that this finding factually conflicted with the record which contained ample evidence of Howard's requests to be released to general population. "Based on this overwhelming evidence, it is clear that Howard genuinely desired to be returned to the general prison population and that his continued confinement in protective custody violated proper administrative procedure. The district court's findings to the contrary are accordingly clearly erroneous."

The appeals court remanded the case back to the district court to determine if the prison officials' conduct constituted gross negligence or deliberate indifference necessary to award damages and, if so, the amount of damages Howard is entitled to. See: *Howard v. Grinage*, 6 F.3d 410 (6th Cir. 1993).

City Liable for Negligent Medical Care

Sean Simpkins was a pre-trial detainee in New York City. While in custody he was taken to the city owned hospital at Bellevue for sinus surgery. Instead of operating where indicated by a CAT scan the doctor operated on the wrong sinus resulting in Simpkins being unable to breathe properly and having continual infections and other complications. Simpkins filed suit claiming that the hospital, the city, and the New York City DOC were negligent for hiring an incompetent doctor to perform surgery on prisoners. The defendants filed a motion to dismiss the suit for failure to state a claim which

the district court granted in part and denied in part.

The court gave an extensive discussion of the law concerning municipal liability. While municipalities and their agencies are subject to section 1983 liability the conduct for which liability is sought to be imposed must have been taken pursuant to the municipality's "official policy." The court liberally construed the complaint to allege that Bellevue hospital and the city of New York have an "official policy" or practice of permitting unqualified doctors to perform surgery on prisoners. Thus, the complaint does state a claim against the city and if proved, would support a finding of deliberate indifference towards prisoners' medical needs by the city. At this early stage of the litigation the court ruled, the plaintiff must be allowed to proceed with discovery to be able to prove his claim.

The court dismissed a claim by Simpkins that his transfer to a state prison prevented him from keeping an appointment with a doctor for his sinus condition. See: *Simpkins v. Bellevue Hospital*, 832 F. Supp 69 (SD NY 1993).

WA DOC Wants to Open New Prison, Close Old Ones

The Washington DOC received a budget increase of 30 percent last year. As part of the two percent budget cut-back affecting all state agencies the DOC has offered plans which would require the closure of two small prisons and delay the opening of the large Airway Heights prison near Spokane. The November 20, 1993, *Seattle Times* article did not cite the prisons to be closed, but staff at the Washington State Reformatory have stated that the camp at Indian Ridge is one of the prisons being considered for closure. The plan does envision closing the honor farm at the Reformatory in Monroe with the 110 prisoners being transferred to other prisons and 35 staff positions being elimi-

nated. The plan would also eliminate 40 work release slots.

At the same time, the DOC has notified cities and counties throughout Washington that it is seeking an appropriate location to build yet another prison. This is to be a 1,936 bed minimum to maximum prison facility. The project is budgeted at \$150 million in construction costs, will employ 800 staff and will cost an estimated \$40 million a year to run in payroll, supplies and maintenance. So far only officials in Okanogan County have expressed an interest in the facility.

It is readily apparent that any talk about DOC "budget cuts" is a sham. The reality is the DOC gets a 28% budget increase instead of a 30% increase. Generally prison construction costs are paid for either by issuing bonds, whose interest is financed by the state or paid for from the state's capital construction budget. Once the factors of financing, interest, etc., are factored in, the actual cost is far higher.

In other Washington DOC news, Division of Prisons Director James Spalding left Washington to become Director of the Idaho DOC effective in early December, 1993. Effective January 1, 1994, Tom Rolfs is the new Director of Prisons for the Washington DOC.

Attorneys File Briefs for Peruvian POW's

By Paul Wright

On October 5, 1993, National Lawyers Guild (NLG) president Peter Erlinder and attorney Leonard Weinglass filed petitions with the Inter-American Commission on Human Rights on behalf of Abimael Guzman, the imprisoned chairman of the Communist Party of Peru (PCP) and several hundred PCP prisoners of war. The petition was originally filed in the human rights court by attorneys in Lima, Peru. Erlinder and Weinglass were requested to serve as co-counsel in the case.

The Lima attorneys filed three petitions which were later consolidated into one case. The issues being presented to the court are: 1) events occurring dur-

ing and after the arrest of Dr. Guzman and other members of the PCP's central committee on September 12, 1992, where Dr. Guzman was publicly displayed in a cage in a striped suit. All the prisoners were denied the right to present a defense, they were tried by an anonymous, hooded tribunal of military judges with no civilian witnesses. The "trial's" verdict was announced by the president of Peru, Alberto Fujimori, before it even began. It also charges that arbitrary sentences of life without parole were imposed and the denial of health care, legal counsel, visitation and reading materials while confined. The prisoners are held completely isolated in solitary confinement without access to counsel, medical care, family or any outside observer such as the Red Cross. 2) The petition charges the government of Peru with violating the POW's rights by subjecting them to mass genocide, beatings, rape, torture and confining them in subhuman conditions which will eventually kill them, i.e. the denial of adequate food, medical treatment and clothing appropriate for the weather. 3) This petition concerns the attacks on the attorneys who defend people accused of political crimes. For example, Dr. Guzman's attorney, Dr. Alfredo Crespo, was himself arrested, charged with treason, convicted and sentenced to life without parole for attempting to represent Dr. Guzman! Many other attorneys have been imprisoned for defending clients accused of political crimes and still others have been murdered, kidnapped, tortured and "disappeared" by government security forces for having political clients.

The chilling effect this has on attorneys willing to represent defendants accused of political crimes is obvious. More so when one considers that in a small, underdeveloped country like Peru there are relatively few attorneys compared to the industrialized nations. It is a tribute to the dedication and bravery of individual attorneys, many of whom are members of the Association of Democratic Lawyers, that political defendants have counsel and that this petition was filed at all.

As relief, the attorneys request that the Commission adopt measures to protect the life and well-being of Dr. Guzman and the other POW's. This includes that the POW's conditions of confinement meet the minimum required

standard set by the Geneva Convention and the United Nations for the treatment of captured combatants. Including inspections by international humanitarian groups and such.

Erlinder and Weinglass recently returned from Peru along with other attorneys assisting on the case. They were denied permission by the Peruvian government to meet with Dr. Guzman or any other POW, including the imprisoned attorneys. The international delegation that accompanied the attorneys issued a statement denouncing the human rights abuses occurring in Peru and the fact that their clients, Dr. Guzman and the POW's, had been denied the right to meet with their counsel or even communicate with counsel.

The legal project to assist the Peruvian POW's needs financial help as well as letters to be sent to the Human Rights Commission. The attorneys are generously donating their time but other expenses associated with international human rights litigation such as this, i.e. travel, phone, translations, mail, copying, etc., are enormous.

Readers are encouraged to write the Commission and ask that they rule in favor of the POW's and seek standards of confinement comporting with minimal international standards for the POW's. Be sure to include the case number which is 11.015. Letters should be sent to:

**Inter-American Commission on Human Rights
Organization of American States
Washington D.C. 20006 USA**

Recent copies of the IEC Bulletin have carried interviews with former PCP POW's as well as interviews with the family of Dr. Crespo and the other imprisoned lawyers. If you would like more information on the legal and political campaign to defend Dr. Guzman and the many other PCP POW's please contact:

**International Emergency Committee
27 Old Gloucester St.
London, WC1N 3XX, England**

The committee has a variety of materials and information on the campaign available, including the legal briefs filed. Also available are booklets on the campaign, videos, a regular bulletin, T-Shirts, buttons, etc.

Third Circuit Announces Rules for Appointment of Counsel

Harvey Tabron is a Pennsylvania state prisoner. He sued prison officials claiming they had failed to protect him from attack by another prisoner. In the course of the litigation Tabron requested that the district court appoint counsel to represent him, order the defendants to provide him with free copies of deposition transcripts of witnesses in the case, and compel discovery. The lower court denied all of these motions and entered summary judgement in favor of prison officials, dismissing the case.

The court of appeals for the third circuit vacated and remanded. The appeals court did not address the merits of Tabron's claim but instead focused on the issue of appointed counsel. The district court had denied the motion for appointment of counsel by ruling that such appointment could only be made "when exceptional circumstances exist." The federal district and appellate courts have authority under 28 U.S.C. § 1915 (d) to request that counsel represent an indigent plaintiff. This authority is discretionary.

Noting that this issue, appointment of counsel under § 1915(d) had not been adequately addressed by the third circuit before now, the court gave an extensive discussion of the case law from all circuits to consider this issue. Several circuits, the 4th, 6th, 9th and 11th, have held that counsel should only be appointed in "exceptional circumstances." "To the extent that these cases impose a substantive restriction on the district courts' discretion to appoint counsel under § 1915(d), we decline to follow them. Section 1915(d) provides that '[t]he court *may* request an attorney to represent *any* such person unable to employ counsel.' (emphasis added). Nothing in this clear language suggests that appointment is permissible only in some limited set of circumstances. Nor have we found any indication in the legislative history of the provision to support such a limitation. Accordingly, we conclude that the magistrate judge erred as a matter of law in stating that he had no discretion to ap-

point counsel in the absence of 'exceptional circumstances.'"

By making this ruling the third circuit follows *Hodge v. Police Officers*, 802 F.2d 58 (2nd Cir. 1986) and *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981). Readers will note that a conflict exists between the circuits on this issue which would provide a basis for Supreme Court review to decide the question.

The court then went on to list the factors the district court must take into account in ruling on a motion to appoint counsel to represent an indigent. First, the district court must consider the merits of the claim. The ability of the plaintiff to present his or her case must also be considered. In doing this the court should generally consider the plaintiff's education, literacy, prior work experience and prior litigation experience. Other factors may include the plaintiff's ability to understand English and, if plaintiff is a prisoner, the constraints placed upon them by the fact of their confinement. "If it appears that an indigent plaintiff with a claim of arguable merit is incapable of presenting his or her case, serious consideration should be given to appointing counsel,... and if such a plaintiff's claim is truly substantial, counsel should ordinarily be appointed." The court should also consider the complexity of the legal issues involved and the degree of factual investigation necessary to prove the claim and the indigent plaintiff's ability to pursue such investigation. "...the court may also consider the extent to which prisoners and others suffering confinement may face problems in pursuing their claims. Additionally, where the claims are likely to require extensive discovery and compliance with complex discovery rules, appointment of counsel may be warranted." "Similarly, when a case is likely to turn on credibility determinations, appointment of counsel may be justified."

The court emphasized that counsel could be appointed at any stage of the litigation and could be made by the court on its own initiative. The above factors are not an exhaustive list but only some that may be considered by

the court. In its opinion the court notes that it may be difficult for the courts to find counsel willing to accept appointment to represent indigent plaintiff's in civil rights claims but they state that more attorneys are providing *pro bono* representation to indigent plaintiffs. "Representation of indigent litigants is not only an important responsibility of members of the bar, but it also provides an excellent opportunity for newer attorneys to gain courtroom experience." The court urged lawyers within the circuit to volunteer for such service and for the district courts to seek the cooperation of the bar on this.

Because the lower court applied the incorrect standard concerning the appointment of counsel the summary judgement was vacated and the case remanded. The appeals court declined to address the merits of the case. The court did address the question of the defendants' refusal to provide Tabron with free copies of the transcripts of the depositions they conducted of the witnesses in this case. Noting that §1915(d) does not permit the expenditure of federal funds to pay litigation costs for indigents the court held that district courts have the equitable power to exercise their discretion and order the opposing party to pay for or provide copies of deposition transcripts for an indigent litigant as a condition for allowing that party to take the deposition. The court upheld the magistrates' denial of ordering the transcripts provided because Tabron did not indicate how or why he needed the transcripts to present his end of the case.

This case contains numerous citations of authority from all circuits and the U.S. Supreme Court on the above issues and should be read by anyone seeking appointment of counsel in a civil rights action. As the court noted, this area of law is pretty bad for plaintiffs in most circuits. Efforts have to be made for the courts to address it. Many courts have adopted plans which have pools of *pro bono* counsel who have volunteered to represent indigent plaintiffs upon the court's request. See: *Tabron v. Grace*, 6 F.3d 147 (3rd Cir. 1993).

Rule of Law or Rule of Five?

By Mark Tushnet

During her confirmation hearings Ruth Bader Ginsburg repeatedly described the role of the Supreme Court Justice as one of enforcing the rule of law. When she begins to work on the Court's cases, though, she may find that her colleagues have a different idea of the job. Justice Thurgood Marshall's papers at the Library of Congress show that most justices subscribe to William Brennan's reported comment to his law clerks that "the most important rule in constitutional law is that with five votes you can do anything." Every justice at one time or another—and some all of the time—adheres to what may be called the "rule of five." Their decisions result from this desire to get a majority of five votes, not from their detached interpretation of the constitution.

The contrary view—the "rule of law"—was expressed by Justice Lewis Powell in a comment he made on a draft opinion by Justice Marshall. In discussing the standards for determining what the constitution required in death penalty cases, Justice Marshall had written that the court should consult "international opinion" and "our own best judgement." Justice Powell urged Marshall to delete those references, saying, "This court is often criticized by those who say that we base our decisions on such factors rather than on the Constitution and the law itself." Justice Antonin Scalia, perhaps the most conservative member of the court, put it this way: "To hold a statute unconstitutional is not to announce that we forbid it, but that the constitution forbids it."

Powell and Scalia were evoking the hallowed notion that we are a government of laws and not of men and women—that the constitution, not the justices of the Supreme Court, tells us what the law is. Occasionally, though, we can see glimpses in the Marshall papers of justices applying the rule of five. Take *Kentucky v. Wharton*, a 1979 case. The issue was whether a state court violated the constitution in failing to instruct the jury on the presumption of innocence. The state Supreme Court had held that the instruction always had to be given, and that failing to give it

could never be "harmless error." When the case reached the U.S. Supreme Court, the justices unanimously agreed that the state court's decision had to be reversed. They were divided, though, over what legal theory was to be applied. The majority believed that the trial judge wasn't required to give the instruction if, under the "totality of the circumstances," the defendant received a fair trial. Three dissenters thought that the judge must always give the instruction, but that sometimes it would be "harmless error" if the judge omitted it.

It doesn't matter to an appellate court which theory it adopts, but it does matter to trial courts. The "harmless error" theory means that a trial judge should always give the instruction, but convictions won't always be reversed if the judge doesn't. The other theory means that it's sometimes perfectly all right for the trial judge not to give the instruction. The two theories tell trial judges different things.

Chief Justice Warren Burger didn't understand the difference between the theories, though, and, exercising his prerogative as Chief Justice, he asked Justice Potter Stewart to write the court's opinion. Stewart wrote back that he actually held the minority, "harmless error" view, and intended to dissent; however, he genially offered to write the majority opinion. And when he did, the votes rolled in. Then, just as genially, Stewart circulated an opinion dissenting from the opinion he himself had written.

In the end, the pages of the United States Reports (the official publication of Supreme Court opinions) contain two opinions, one for the majority and one for the dissenters, both written by Justice Stewart. To save appearances, though, the majority opinion was signed "per curiam," meaning the author of the published opinion isn't identified.

I doubt anyone could publish opinions going both ways on what "the constitution" means without accepting the rule of five vision of the constitution, rather than the rule of law vision. And I suspect no one could hold firm to the rule of law vision while observing the others following the rule of five. But, as it happens, sometimes even justices we

might expect to accept the rule of law vision quite firmly behave otherwise.

In the so-called nude dancing case, decided in 1991, *Barnes v. Glen Theatre*, the city of South Bend claimed that an Indiana statute prohibiting public indecency made it unlawful for a theater to feature nude go-go dancers. The court had to decide whether the statute violated the defendants' right of free speech under the first amendment. Five justices agreed that it didn't, but they disagreed about why.

Chief Justice William Rehnquist circulated a draft opinion saying that the ban was, in legal jargon, "content based." As the court had used the term, regulations of speech are content based when the reason for adopting them is that people who hear the speech (or see the dancers, dancing being a form of speech) end up thinking bad thoughts, which ordinarily might lead them to do bad things. In finding the nude dancing ban content based, Rehnquist's draft made the sensible point that the city's reason for banning nude dancing was that it's content was erotic, which meant precisely that it led viewers to think bad thoughts.

The problem with Rehnquist's analysis, though, was that the court has frequently said that the constitution permits content-based regulation only if there is a close connection between the speech and bad conduct. Rehnquist's draft did connect viewing erotic dancing to bad conduct, but no one else on the court believed that he had shown that the connection was as strong as the court's prior rulings seemed to require.

No one joined Rehnquist's draft, and so it gathered dust. Justice Scalia circulated a separate opinion, but no one liked it either. Eventually Rehnquist got fed up and sent around still another opinion. This one said that the ban on nude dancing was *not* content based, which meant that the connection between the dancing and bad conduct didn't have to be nearly as strong. Once the opinion described the regulation that way, justice Sandra Day O'Connor and Anthony Kennedy agreed that the connection between nude dancing and bad conduct was close enough to satisfy the court's previous rulings on that kind of regulation.

Rehnquist's published opinion said, "We do not think that when Indiana applies its statute to nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers." What the first draft asserted, the second draft repudiated. The rule of five was decisive.

I don't mean to single out Rehnquist for criticism here. The real point is that everybody on the court at least occasionally writes an opinion that, on some crucial point, is directly contrary to what the author had written in an earlier draft—and not because the author changed his or her mind but simply because the opinion "didn't fly." Or, as the saying around the court goes, "five votes are better than four."

When justices write directly contradictory drafts, or join and then "unjoin" opinions for reasons unconnected to what they think about the merits, surely they must think the rule of five describes constitutional law better than the rule of law does.

In an opinion written in 1991, Justice Scalia suggested one possibility. He wrote, "I am not so naive... as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were finding it."

This seems to me remarkable. When judges act in this "as though" way, they divide the world into insiders, who know that the judges "make" law "as though" they were finding it, and outsiders, who believe the judges when they say they are finding the law. This division is reminiscent of the political theories of Leo Strauss, who also thought insiders knew things about political truth they could not afford to disclose to outsiders. (Scalia may have slipped when he published his statement for outsiders to read.)

Perhaps the Straussian "as though" approach might be defended: Whenever the court finds a statute unconstitutional, it is saying to the people, "You can't do what you want to do." That statement invites the reply, "why not?" The answer "because the constitution says so" might be conclusive. But the answer "Because we say so" surely invites yet another question: "And who are you to tell us this?" So, if we really are a government of men and women, for the constitution to be an effective limit on what majorities want to do, the

people—the outsiders—must believe that we are a government of laws nonetheless.

I don't buy it. We would be better off if people understood that we can't get what we want because, deep down, we know that our temporary desires—what we happen to want right now—are inconsistent with what we really want: the values we believe are imbedded in our constitution. The mature understanding displayed by Justices Marshall and White is, in the end, more attractive than the the Straussian one asserted by Justice Scalia.

Reprinted and edited from The Nation

Court Upholds Silencing of Dan Quayle's Drug Supplier

Brett Kimberlin is a federal prisoner serving a 51 year sentence on drug and weapons charges. He briefly gained a bit of notoriety during the 1988 presidential campaign when he claimed that he had supplied drugs to George Bush's vice-presidential running mate, Dan Quayle, in college. On at least three occasions Kimberlin was scheduled to have meetings with the media detailing the allegations and each time he was placed in segregation by prison officials which safely prevented him from contacting the media until well after the election. Dan Quayle is history but the litigation continues.

Kimberlin filed suit claiming that his repeated segregation by federal Bureau of Prisons (BOP) officials constituted retaliation for the exercise of his first amendment rights. The district court dismissed some of the claims but held that there was sufficient evidence requiring a trial to determine if prison officials had acted to silence Kimberlin which we reported in *PLN* at the time, see: *Kimberlin v. Quinlan*, 774 F.Supp 1 (DC 1991). The government filed an interlocutory appeal claiming that they were entitled to qualified immunity from suit and that Kimberlin should not even be permitted to present his case to a jury. The court of appeals for the District of Columbia Circuit sided with the government.

The appeals court held that under it's "heightened pleading" standard Kimberlin had to present direct evidence that he had been retaliated against, despite the fact that he was not permitted to conduct discovery. The majority opinion notes that it imposes an even more stringent standard on civil rights plaintiff's whose claim depends on the official's state of mind, as in retaliation cases. The fact that there were discrepancies between prison officials' reasons for the segregations, that they occurred immediately prior to scheduled contacts with the media and the fact that BOP Director Quinlan personally ordered Kimberlin's segregation, the only time a BOP Director had ever done so in the case of an individual prisoner, was immaterial.

Circuit Judge Williams in his concurring opinion notes that the DC Circuit is the only circuit to impose a heightened pleadings requirement and expresses his dissatisfaction with the rule. Noting that the requirement is fatal to a case unless there is a defendant's confession, he notes that "while a perjured claim of having heard such a confession would meet the test, a massive circumstantial case would not."

Judge Edwards gave a lengthy and stinging dissent to the majority opinion by holding that Kimberlin had presented more than sufficient evidence to show retaliation against him for seeking to contact the media. Noting the importance of the issue, whether the candidate for vice-president and eventual holder of the office had been a drug user, was a matter of substantial public concern. "Just days before the election, he was twice placed in 'administrative detention,' where he was effectively precluded from sharing his story with an understandably curious media. While we might expect such official action not to raise eyebrows in a country with fewer guarantees of civil liberty, such action is unfathomable in this country under our constitutional system of government. I simply cannot imagine that the judiciary of the United States will shut the doors of the courthouse and refuse to allow Kimberlin's suit to proceed for the specious reason that his complaint is based on circumstantial evidence."

The dissent, which is longer than the actual majority and concurring opinion, gives a detailed discussion of the differ-

ences between circumstantial and direct evidence in retaliation and civil rights suits. It also criticizes the "heightened pleading" requirement of the DC Circuit and notes that it directly conflicts with applicable supreme court authority and every other circuit to consider the question. It would appear that the DC circuit is not a good place to file civil rights actions if there is a choice of another forum. See: *Kimberlin v. Quinlan*, 6 F.3d 789 (DC Cir. 1993).

From the Editor

By Paul Wright

Welcome to another issue of *PLN*. You will notice that we are still experimenting with different formats. Our goal is to improve our appearance and at the same time make it more readable, just like the "real" magazines. Our last issue had four columns of text for the most part, while I kind of liked it most people who saw it said it looked too scrunched together. This issue we are trying three columns to see how it looks. We welcome feedback from you, our readers, as to what you like and what you would like to see. That goes both in terms of style and substance. We don't answer to advertisers, big money or corporate donors but just to you, our readers, so let us know what you want and we'll see what we can do.

Please check your mailing label to ensure the information is accurate. If any changes need to be made let us know as soon as possible, send the label back with any changes if you can.

In December prisoners here at WSR in Monroe, WA began to receive our first computers for in cell use. This is the culmination of almost five years of struggle. Between 1986 and 1989 WSR prisoners were permitted to have computers in their cells. This resulted in prisoners gaining valuable computer skills that enabled them to get real jobs when they got out. To date, no computer owner that has been released has been returned to prison. In 1989 Larry Kincheloe became director of prisons and one of the first things he did was take the computers away. Long time readers of *PLN* will recall that we reported the ups and downs of this struggle over the years, which included litigation and senate hearings to expose the lies he used to justify his actions.

Ed was the main driving force behind the struggle. If anyone deserves credit for our having computers again it is he, and the outside volunteers and community supporters that joined this struggle--especially Jon Nelson and Jack Roos (who are sponsors of the Lifer's and made repeated pilgrimages to Olympia to meet with DOC officials and keep on them about this). I thought it was quite ironic that Ed would be out of prison before we got the first machines in. In May of 1992, then Director of Prisons, James Spalding, told Ed he would approve the computers again. It took 19 months to go from that to actually having them. I must note that the state built and filled two control units in less time, it's all a matter of priorities.

The computer policy is quite limited compared to what we had before, only 7 applications programs are allowed, no disks are allowed nor modems or fax hookups. Many former prison computer owners have not bought computers because of their dissatisfaction with the policy. While to those in prison systems who do not permit even prisoner owned typewriters this may seem nitpicky, but it's all relative.

This is a pilot project affecting only WSR and is slated to last a year at which time prisoncrats will decide to continue, halt or otherwise modify it. WSR now joins the New Jersey and Wyoming DOC's in permitting in cell computer use. We have to buy our own computers, thus, no cost to the taxpayer is involved. Both as a means of rehabilitation, learning meaningful job skills and a valuable tool for propaganda and litigation this is something that prisoners should struggle for. It's interesting to note that *PLN* readers in the Argentine prison system have free access to computers (and twice a week conjugal visits) and a wide variety of software.

I've never been much into mechanical things so I'm slowly learning the relevant software. I've taken computer courses while in prison but the software changes quite a bit from version to version. WordPerfect 6 for Windows has all sorts of bells and whistles.

On other fronts, we continue in our effort to expand *PLN*'s circulation. We have passed the 900 mark in U.S. subscribers, with readers in 48 states. We will soon be printing more than the current thousand copies which will leave us with a lot of left overs to distribute.

If you have events or such to hand out copies contact us about getting them for little more than the cost of postage. We rely on our readers and word of mouth to let people know we exist and what we have to say. So let friends, family, colleagues and such know about *PLN* and encourage them to subscribe. Prisoners especially need to let others know about us. Due to the spreadout nature and inaccessibility of the nation's prisons this is the only way we have of letting most people know about us. Blurbs in prison newspapers and other publications are a big help. We can also send a sample copy to anyone you think is likely to subscribe, just give us their name and address. Any donations to help offset the postage costs involved are much appreciated. If your prison allows it, we can send you bulk issues of *PLN* to distribute to potential readers, contact me for more information.

Feel free to send us articles, comments, suggestions and information. We frequently get bundles of documents from readers who then want us to put it into article format. It's a lot easier on us and quicker in terms of "into print time" if you send us articles already written. In many cases we lack the time to sort through hundreds of pages of documents to get a story out of it. Remember we do not cover criminal law nor cases involving wrongful convictions and such. Our focus is on prison civil rights and issues related to prison struggle. The individual details of how we got here is immaterial to what we do. In the few cases we do publicize the situation of an individual prisoner it usually concerns conditions of confinement and involves political or activist prisoners. We have to have some means of winnowing this down because we get a huge amount of mail from folks outraged over the real or perceived injustice of their own situation. What we try to get across in *PLN* is that it is the system as a whole that is unjust rather than an isolated instance. We need to get beyond our own individual cases and deal with the systemic root causes. One step is realizing that without social and economic justice we won't have criminal justice.

One other thing is that we frequently get requests to advertise or blurb books, materials or other products. *PLN* doesn't accept paid advertising. We have two reasons for this, one, no one's

offered us any, and two, we want to avoid becoming dependent on any source of income that would influence our political content and line so we don't solicit it. We do review and blurb products as a service to our readers, in fact, I do most of the magazine and similar reviews. For this, send me a sample of whatever you're hocking or write us first to see if it's anything we're interested in blurring. By seeing what we blurb we can assure our readers of what they should be getting for their money. The other result of this practice is that you never see a bad review or blurb in *PLN*. If we don't feel it's worth having or it's a ripoff, etc., then we don't waste the print to talk about it. No one likes to be ripped off and we'll do our best to ensure that doesn't happen to our readers. Enjoy this issue of *PLN* and pass it along to others when you're done with it.

Attention New Jersey Readers

FAMM/NJ (Families Against Mandatory Minimums) needs your help! This is a plea to all prisoners who have family and friends who reside in New Jersey. Please send their names, addresses and telephone numbers.

FAMM/NJ is dedicated to getting Congress to change the mandatory minimum sentencing laws which give rise to draconian sentences. Our mission is to educate the public about the gross unfairness of mandatory minimum sentences and about how these sentences affect their daily lives. To be an effective organization, we need bodies and voices who are willing to cry out against the injustice.

We cannot continue to sit back and believe that someone else will do it. We

cannot afford to believe that nothing can be done, so we should do nothing. Regardless of the struggle, we must continue to fight. More importantly, you have to know that the crazy sentences do not just affect you. They affect all of us. Besides money spent on housing prisoners and building jails, we pay with the loss of our loved ones' companionship. Our children pay with the loss of affection of parents.

Please respond as soon as you can. Send the names, addresses and telephone numbers of your spouse, your family, your friends and associates. We'll reach out to them and let them know how they can help. Write to them in care of:

Cassandra Savoy
141 South Harrison St.
East Orange, NJ 07018

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Court Enjoins BOP Phone System

On October 13, 1993, Judge Henry Wilhoit of the U.S. District Court in Kentucky entered a preliminary injunction barring the federal Bureau of Prisons from implementing its Inmate Telephone System (ITS). The case is *Washington v. Reno*, case number 93-217 and 93-290. Readers should note that so far this is an unpublished opinion that cannot be cited for precedent, but it does affect all BOP facilities in the U.S.

Conchita Washington and several other prisoners at the federal prison for women in Lexington, Kentucky, filed suit claiming that the BOP is ITS dis-

criminates against poor and disabled prisoners. The BOP began implementing a phone system, ITS, which changed its phone system from one which allowed collect calls only to one which is direct dial requiring prisoners to pay for the calls. In order to be able to make phone calls prisoners must also participate in the "Inmate Financial Responsibility Program," IFRP. The IFRP is a coercive program designed to force prisoners to pay all fines, restitution, etc. All funds received by a prisoner from any source are subjected to IFRP collection. Thus, prisoners who do not wish to participate in the IFRP receive virtually no phone privileges. Non-IFRP participants are allowed one collect call every 90 days, or in cases of family emergencies and to place unmonitored, staff assisted collect-calls to attorneys.

The ITS permits prisoners to have only 20 phone numbers that they can call. The BOP may approve or disapprove numbers at will with no appeal process to challenge such actions. It also has many monitoring, tracking, investigative and interrupt control features. The equipment is owned by GTE and leased by the BOP. It is paid for with the profits from the Prison Commissary Trust Fund.

In its order granting the preliminary injunction the court made numerous findings of fact. Specifically, the court ruled that the ITS system, while it may be desirable to some prisoners, does discriminate against indigent and poor prisoners who lack the funds to pay for direct dial phone calls. The court held that a full reading of the contract and the BOP's Request for Proposal indi-

cate that, contrary to the BOP's assertion, the ITS does not limit its capability to allow for collect calls as well as direct dial. While the costs of direct dial calls are cheaper than collect calls there are no provisions for those prisoners too poor to make direct calls.

The court notes that according to 31 U.S.C. § 1321(22), the Commissary Trust Fund, the profits of the trust fund are to be spent solely for the benefit of all prisoners in accordance with the terms of the trust. The BOP is using funds from the Trust to purchase ITS equipment and staff its operation.

In granting the motion for a preliminary injunction the court held the prisoners had shown a high likelihood of success on the merits and expressed its doubts as to the constitutionality of the ITS. The phone list requirement and its limitation to ordinarily list only family or friends without BOP approval raises serious prior restraint concerns. The court also found a complete dereliction on the part of the BOP to comply with the Administrative Procedures Act (APA), 5 U.S.C. § 553. The court held that under the APA the BOP should have properly repealed the collect call provisions codified in 28 C.F.R. § 540.104 before implementing the ITS.

The court held that, as implemented by the BOP, the ITS probably violates the appropriations law concerning the expenditure of trust funds because it discriminates against both indigent prisoners and non-IFRP prisoners. "This discrimination likely represents a breach of fiduciary duty under the trust because trust funds are not being spent impartially for the benefit of all inmates as the trust terms require." Because sig-

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nificant additional money will have to be sent to prisoners from outside sources to pay for the calls this poses security risks which the BOP has argued in other cases and also violates the terms of the Trust Fund. The operation of the ITS is also not a proper function of the Prisoner's Commissary Trust Fund. The prisoners showed irreparable injury because they would have less funds to spend on commissary items and because they are limited to only 20 persons whom they may call and this excludes ministers, courts, etc. Prisoners are further harmed by having to become IFRP participants before they can make phone calls. Because phone contact with friends and family is important for rehabilitative purposes, restrictions on phone access must be minimized.

Because the expenditure of funds from the Trust Fund is not authorized the prisoners are irreparably harmed by that as well. The court seemed particularly outraged by the fact that prisoners were being denied phone access with the very money Congress intended to be used for their benefit. The BOP argued that the injunction would cost the BOP \$18 million. The court noted: "...that the Bureau's perceived 'harm' has not been caused by anything the plaintiffs did nor by what this court's injunction may do, but rather by the Bureau's decision to implement the ITS nationwide without any attempt to comply with the APA or otherwise seeking prior approval of the ITS from Congress. Equity does not ordinarily reward inequitable or improper conduct. In many respects, the Bureau's position that it should not be enjoined from implementing the ITS because it will incur too great a cost to stop the ITS is not well taken by the court when the Bureau would never have come to this position if it had properly complied with the law in the first instance." The BOP was enjoined from operating the ITS unless a collect call system was also made available and it must be substantially similar to the system previously used by the BOP. While prisoners using the ITS can list only 20 persons to call, the list cannot be limited to only family or friends.

The BOP was enjoined from using Commissary Funds to pay for any expenses associated with the ITS. On November 18, 1993, Judge Wilhoit certi-

fied a class action whereby all federal prisoners are added as plaintiffs in the suit. The BOP appealed the court's order to the Sixth Circuit Court of Appeals which on December 7, 1993, limited the courts injunction to only those BOP facilities which did not have the ITS installed yet. It did not address other parts of the lower court order. It ordered that the appeal be placed on an expedited briefing schedule. *PLN* will report further her developments in the case as they occur.

The plaintiff's attorney is Douglas McSwain, 155 East Main St. Lexington, KY. 40507-1393. (606) 255-8581. He notes that he cannot respond to all correspondence from the plaintiffs.

Ohio to Build Super-Max Prison

In the wake of the April, 1993 rebellion at the Southern Ohio Correctional Facility (SOCF) which left 10 dead, Ohio prisoners and prison activists had hoped the state would examine its policies which resulted in Ohio have the highest level of overcrowding in the nation at 178%. The state's response has been one of more repression. The state has announced plans to build a super-max prison similar to the facilities at Pelican Bay in California and the federal penitentiary at Marion, IL. These super-max prisons have prisoners locked in their cells 23 hours a day, deprived of human contact and virtually all communication with the outside world. These prisons have been criticized by human rights groups and are the focus of extensive litigation concerning both conditions of confinement and brutality that occurs within them.

The Ohio Department of Rehabilitation and Correction (DRC) has formed a committee to develop plans and recommend a site for the new super-max prison. If the general assembly approves the funds, the prison will have 550 beds. Since Marion became a lock-down prison in 1983 some 37 states have since built super-max prisons whether they need them or not. This trend is now reaching Ohio which already has a super-max control unit at Lucasville.

OH Prisoners Seek Court Access

Ohio prisoners have filed a class action suit alleging that the Ohio DOC has promulgated conditions which prevent the exercise of prisoners right of access to the courts. The claims include depriving prisoners in segregation and protective custody of law library access and access to persons trained in the law. Not providing persons trained in the law to assist illiterate and functionally illiterate prisoners in general population and segregation to assist in the filing of legal papers in court; not providing pens, paper or carbon paper to prisoners too poor to afford them due to the high costs of hygiene supplies on the inmate store; not providing adequate supervision of prison law libraries to ensure that the prisoner law clerks are either literate or capable of assisting others in filing claims in court; not providing prisoners with hygiene supplies; not providing Ohio prisoners with sufficient work pay for them to purchase hygiene supplies such as toothpaste, soap, aspirin, etc., which leaves prisoners unable to afford legal supplies for litigation; overcharging prisoners for legal photocopies; refusing to make photocopies for prisoners unable to pay the extortionate rates; refusing to mail legal mail to the courts if the prisoner cannot afford to pay the postage and not allowing prisoners to photocopy the legal materials, affidavits, etc., of other prisoners that are needed for their own claims.

Other issues challenged in the suit are not providing notice of the prisons rules which subject prisoners to disciplinary charges. Not providing sufficient staffing to prevent violent assaults or respond to medical emergencies. The forced, involuntary racial integration of individual cells. Forcing prisoners to live in cell blocks with excessive noise dues to overcrowding.

The plaintiffs also allege that law library access is inadequate, the grievance system is biased against prisoners, and the good time system discriminates against prisoners serving determinate sentences as opposed to those serving indeterminate sentences.

The court has refused to appoint counsel to date and the case is being litigated by Ohio prisoner James Love. The plaintiff's urgently need counsel willing to assist in the case due to the complexity of the issues, the expenses involved, and the overall difficulty of litigating class action suits from within prisons. Anyone desiring more information or willing to help with counsel, contact: James Love #228732, P.O. Box 120-2B-164, Warren Correctional Institution, Lebanon, OH 45036-0120

Minor Detainees Entitled to Education

Twenty-three school age detainees in the Cook County Jail (Chicago, Illinois) filed suit alleging they were either denied complete access to regular and special educational services during their period of pre-trial detention or received services vastly inferior to those provided non-detainees. The plaintiff prisoners claimed this condition violated their substantive and procedural due process rights, their equal protection rights, the Individuals with Disabilities Education Act (IDEA), 20 USC § 1400 *et. seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. The defendant school and jail officials filed a motion to dismiss the suit arguing that plaintiffs have no right to an education. The district court denied the motion.

The opinion begins by noting there is no right to an education under the federal constitution. The plaintiffs claimed that only 39 percent of school-aged pre-trial detainees are in need of special education services were receiving them. They were not being taught courses other than reading and math, lacked textbooks, workbooks, or other instructional materials and were not given learning disability assessment and instruction. 1,470 school age pretrial detainees were not receiving any kind of educational services. The court ruled that these facts were sufficient to state a substantive due process and equal protection claim. The court rejected the defendants' contention that prison security needs justified their failure to provide educational services. The court

said no rational relationship had been shown between the asserted interests and the actions of jail officials.

The district court summarized the defendants argument as "not relat[ing] to the state's interest in maintaining prison security, but the state's desire to be free of prisoner litigation." The judge went on to note that, "Apocryphal claims of burdensome litigation do not justify disparate treatment under the equal protection clause."

The court held that the statutory language and history of IDEA makes in applicable to students in state correctional facilities. The department of education has codified this interpretation in 34 CFR § 300.2(b)(4). Likewise, the Rehabilitation Act of 1973 also applies to the plaintiffs because the jail defendants receive federal funds to provide some educational services to its detainees.

Given the large number of youth entering the state prison systems, it would seem that similar actions could be instituted at those prisons or facilities (i.e., control units, death row, etc.) that do not provide educational services or resources to school-age prisoners. See: *Donnell v Illinois State Board of Education*, 829 F.Supp. 1016 (ND IL, 1993).

9th Circuit Affirms Gutting of WSR Consent Decree

By Paul Wright

In 1978 prisoners at the Washington State Reformatory (WSR) in Monroe, WA filed suit over inhumane prison conditions at the prison. In 1981 prisoners and the DOC entered into a consent decree whereby the prisoners dismissed the suit in exchange for, among other things, an agreement that the DOC would keep the WSR population at it's single cell capacity. This was done under the belief that many of the conditions complained of, i.e. violence, idleness, inadequate medical care, dilapidation of the physical plant, etc., resulted from overcrowding. No sooner was the ink dry on the consent decree than

prison officials began trying to weasel out of it. In fact, the single celling provisions of the decree were not met until 1987.

This case has been up and down through the courts several times since it was filed. It has been appealed to the ninth circuit by the state three times since 1990. We have covered the ups and downs of the case in detail since *PLN* began. The latest round of litigation which set the stage for this ruling was when the district court ruled that the terms of the consent decree were met in 1987 when the state single-celled WSR, thus terminating the court's jurisdiction in the case. The magistrate in the case had ruled in the prisoners' favor yet his report was overruled by judge Rothstein. The effect of this ruling was that the consent decree is meaningless and prison officials are free to again overcrowd the Reformatory.

Consent decrees are agreements between parties much like contracts and are legally interpreted as contracts. In this case the appeals court ruled that once the state met the terms of the decree and single celled WSR it was under no obligation to continue doing so. In a significant departure from well established law or consent decree enforcement, the court held that absent ongoing constitutional violations a district court lacks jurisdiction to monitor or enforce the provisions of a consent decree.

The court's opinion is brief yet devastating. Until now it was well established law that consent decrees usually embody terms that go beyond bare constitutional minimums. As contracts they are enforced as such and can only be modified if there is a significant change in conditions. This ruling conflicts with every other circuit to consider this issue as well as U.S. Supreme Court rulings.

Bob Stalker of Evergreen Legal Services, who has done a magnificent job representing prisoners in this suit over the years, filed a petition for a rehearing en ban by the ninth circuit. This was recently denied. The next step will be to petition the Supreme Court for review. However, certiorari is rarely granted by the Supreme Court so we will be stuck with both the bad decision and its practical effects for some time to come. See: *Collins v. Thompson*, 8 F.3d 657 (9th Cir. 1993).

Chicago Police Torture Suspects

[Generally PLN only reports on cases involving prison civil rights issues or the occasional procedural matter affecting pro se litigants. This is a police brutality case which we present more for its informational value than its relevance to prison litigation. All too often we hear about police torture and "human rights" abuses but invariably they occur in far away lands not friendly to the U.S. government. Yet the same types of abuses commonly associated with third world countries routinely occur here in the U.S. Occasionally a court will report the matter.]

In 1982 Andrew Wilson shot and killed two Chicago policemen. He was duly convicted and sentenced to death but later had his conviction reversed and is now serving a sentence of life without parole. He filed suit under section 1983 because shortly after his arrest he was massively tortured by Chicago police in an effort to obtain a confession from him. The torture consisted of being punched, kicked, smothered with a plastic bag, being given electrical shocks and forced against a hot radiator throughout the day of his arrest until he confessed. The state supreme court had already reversed his conviction because the confession was coerced and a police disciplinary board had suspended two and fired one of the torturers.

When his case went to trial the torturers were defended by the prosecutor who had convicted Wilson. One eight week trial ended in a hung jury and the second eight week trial had the jury rule that Wilson had indeed been tortured and that the City of Chicago had a de facto policy authorizing its policemen to physically abuse people suspected of killing or injuring policemen, but the jury exonerated all the defendants.

The court of appeals for the seventh circuit reversed and remanded for a new trial. The appeals court held that many of the trial judge's evidentiary rulings were improper and prejudicial to Wilson. "Even a murderer has a right to be free from torture and the correlative right to present his claim of torture to a jury that has not been whipped into a frenzy of hatred."

The trial judge erred in admitting the details of the cop's murders noting they were prejudicial to Wilson and had no probative value. The evidence intro-

duced included the actual murder weapon which defense counsel waved about in final argument, photos of the murder scene, Wilson's glasses and more. Wilson was also forced to show a tattoo on his arm because the defendants claimed that he was prone to "self mutilation" and thus faked the radiator burns on his back. The appeals court ruled this "stretches the evidence of relevance to the breaking point. Would evidence that Wilson had a pierced ear have been admissible for this purpose?"

Noting that the trial judge was too generous in letting the defendants admit evidence he was too stingy in letting the plaintiff admit evidence. This included not admitting testimony from other victims tortured by the same policemen only a few days before Wilson's torture, not permitting impeachment evidence against the credibility of the defendants, etc. It also ruled that the trial court had correctly excluded evidence from a pathologist who claimed to be an expert on torture. Noting that such expert testimony does exist, the plaintiff's expert was not qualified as such by his medical training (doing autopsies) or knowledge. See: *Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1993).

Court Rules Suit Waiver is Not Enforceable

This case involves release-dismissal agreements where a party will agree not to sue a government agency or official and the agency in turn agrees to either drop or reduce charges against the person. In many cases prison officials will have prisoners agree not to file suit in exchange for release from segregation, transfers to more desirable prisons, or other real or imagined benefits.

Diane Cain is a Pennsylvania citizen arrested and charged with several criminal violations of the Pennsylvania criminal code. Before trial Cain asked to be placed in the Accelerated Rehabilitation Disposition (ARD) program so that upon completion of probation the charges against her would be dismissed.

Under a policy of the local district attorney, if the police may face civil li-

ability the DA will not approve ARD unless the petitioner first executes a release-dismissal agreement. Cain signed the agreement and released her claims against the policemen who arrested her. She later filed suit against the policemen claiming they had used excessive force in arresting her. The defendants filed a motion for summary judgment, claiming that the release-dismissal agreement provided them with an absolute defense.

The district court agreed and ruled that because Cain had signed the release voluntarily it acted as a complete bar to her claim. The court of appeals for the third circuit, sitting *en banc*, held such agreements are not in the public interest and are not enforceable as a matter of law.

In *Town of Newton v. Rumery*, 480 US 386, 107 S.Ct. 1187 (1987), the supreme court held that release-dismissal agreements must be examined on a case by case basis holding that they are enforceable if the interests in its enforcement is outweighed by a public policy harmed by enforcement of the agreement.

The appeals court in this case notes that there is a strong public interest in allowing section 1983 suits and a strong public interest against release-dismissal agreements that bar colorable 1983 claims.

"Litigants who bring meritorious section 1983 claims," the court said, "advance societal interests because the vindication of their constitutional rights helps provide an important check on public officials and presumably deters a range of official misconduct." For this reason we hold that mere voluntariness is not enough to support enforcement of a release-dismissal agreement. The party seeking to enforce the agreement must show that upon balance the public interest favors enforcement."

In this case the DA's office has a blanket policy requiring dismissal from every ARD petitioner who may have a civil rights claim against government officials. This practice does not serve the public interest and thus invalidates any release-dismissal agreements because there is no case-specific showing that the DA's office sought to protect any public interest.

The court of appeals remanded the case back to the district court to be decided on its merits. See: *Cain v. Darby Borough*, 7 F.3d 377 (3rd Cir. 1993) (*En Banc*).

Smoking Ban Upheld

In May of 1993 officials at the Berks County Prison in Pennsylvania initiated a policy which prohibited smoking by prisoners at the facility. Four prisoners filed suit claiming that the ban on smoking constituted cruel and unusual punishment in violation of their eighth amendment rights. They also claimed that a program designed to help tobacco addicts overcome their craving for tobacco products was not adequate to help the former smokers and constituted deliberate indifference to their medical needs. The district court upheld the ban, finding it constitutional.

The court notes that there is no constitutional right to smoke in jail or prison. The court took judicial notice of the Surgeon General's report that smoking causes increases in the occurrence of lung and larynx cancer, coronary artery disease and chronic bronchitis and that even second hand tobacco smoke kills over 4,000 Americans a year. Because prison officials are responsible for prisoner's health care and medical needs such a smoking ban is not inconsistent with society's "evolving standards of decency."

Given the health risks associated with tobacco use and the fact that more and more facilities in the developed world prohibit smoking such a ban does not conflict with society's standards. Any pain associated with tobacco withdrawal is not inflicted by officials in an unnecessary nor wanton manner. The court also held that the provision of some treatment for tobacco addiction is sufficient to meet whatever medical needs the tobacco addicts may have.

Given the content of the U.S. Supreme Court's 1993 decision in the case of *Heller v. McKinney*, which held that prison officials' exposure of prisoners to second hand tobacco smoke states a cause of action for violation of the eighth amendment, it is likely that more and more prisons and jails will ban smoking by prisoners altogether rather than attempt to accommodate smokers and non smokers. See: *Reynolds v. Bucks*, 833 F. Supp 518 (ED PA, 1993).

New Book Planned

The *Hidden Side of The Criminal Justice System* by prisoners, ex-prisoners, their family members and loved ones. Prisoners and ex-prisoners: Who are you? Send us your poetry, art, fiction, or personal history.

Prisoners, ex-prisoners, family and loved ones: How "just" is the trial process? What is the effect of limiting the rights of the accused, the convicted, the imprisoned, and the condemned? How are victims chosen intake death penalty "lottery"? How does society lose by imposing the death penalty? What are the root causes of crime? Why does a prison forcibly drug a prisoner and what is the result? What earns a prisoner time in a security housing unit—and release? In what ways does life on the streets affect a prisoner—and affect society after release? How does prolonged isolation and other tortures affect a prisoner—and affect society after release? What causes recidivism? How are prisoners prepared to re-enter society? Give the public the other side of the story!

Some of your submissions may be printed in the *North Coast Xpress*. Send written materials to: North Coast Xpress, P.O. Box 1226, Occidental, CA. 95465

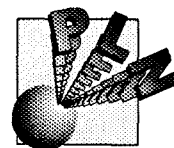
S.Ct. Hears Argument in Prisoner Attack Case

On January 12, 1994, the U.S. Supreme Court heard oral argument in *Farmer v. Brennan*, Case no. 92-7247. Farmer is a transsexual federal prisoner who was raped after being placed in general population at the U.S. Penitentiary at Terre Haute, IN. She filed suit claiming that prison officials were deliberately indifferent to her safety by placing her in such an environment where they knew or should have known she was likely to be sexually assaulted. The district court had dismissed Farmer's suit stating she had not shown prison officials were aware of any dan-

ger or risk to her. The court of appeals for the seventh circuit affirmed.

The Supreme Court will decide the extent of prison official's liability for failing to protect prisoners in their care. The plaintiffs ask that the court focus on the obviousness of the risk involved to rule in Farmer's favor. The government argued that prison officials must have "actual knowledge" of danger to a prisoner's safety before they can be deliberately indifferent to the prisoner's safety.

Stop Prisoner Rape, a non-profit educational group which seeks to do just what its name says, filed an amicus brief with the court. The brief gives a lengthy and extremely detailed examination of the scope and problem of rape in this country's prison and jail facilities. It provides useful and valuable information for anyone litigating this issue. Copies of the brief are available for \$3.00 (unbound) or \$6.00 (bound) from: SPR, 3149 Broadway, #4, New York, NY. 10027 (212) 666-0344.



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The Rights of Visiting and Visitors

By Paul Wright

For every prisoner and the relative, friend or loved one of a prisoner, visiting is an issue of paramount importance. While most prison officials pay lip service to the idea that visiting is important and that they want to do everything to enable prisoners to maintain ties to their families and the community, which lowers recidivism based on studies by the National Institute of Justice, the reality is often quite different. Not only are prisoners' visitors treated as bad or worse than prisoners themselves, in many cases they are treated worse than people actually arrested on suspicion of having committed a crime. This serves to discourage visiting as well as degrade and humiliate visitors whose only "crime" is having a friend or relative in prison.

As a general rule prisoners have no federal constitutional right to visiting and prison officials can deny the privilege for any reason or no reason at all. See: *Kentucky Dept. of Corrections v. Thompson*, 109 S.Ct. 1904 (1987) and *Evans v. Johnson*, 808 F.2d 1427 (11th Cir. 1987). Nor is there a right to contact visits. See: *Block v. Rutherford*, 468 U.S. 576, 104 S.Ct. 3227 (1984). The groundwork for these supreme court decisions was laid in the 1970's when the court upheld California DOC regulations which did not allow the media to interview prisoners it wished to interview, only those selected by prison officials. This regulation was in response to the prison struggle being waged at the time by prisoners like George Jackson and the Soledad Brothers which attracted media attention and helped expose the gross human rights abuses of the American Gulag Archipelago. See: *Pall v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800 (1974). As recently reported by *PLN*, the courts are further expanding upon these rulings to uphold the denial of contact visits with prisoners' attorneys. See: *Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993).

The net effect is that the prison walls serve to keep the media, public and public scrutiny, loved ones and family members out as well as the convicted criminal being shut in. One would pre-

sume that public officials with nothing to hide and intent on serving the public interest by doing what they can to help prisoners maintain their family and community ties would act differently, but such is not the case. The actual effect of these practices are further exacerbated by the fact that the majority of American prisons are located in rural areas far from the urban cities that the vast majority of prisoners come from and where prisoners' families reside.

While there is no right to visitation under the federal constitution, state laws and prison regulations can and do create liberty interests enforceable in federal court under 42 U.S.C. § 1983, the civil rights statute. Thus, in *Patchette v. Nix*, 952 F.2d 158 (8th Cir. 1991) the court held that Iowa visiting rules created a liberty interest in weekend visiting which prison officials could not modify without providing due process, the court issued an injunction preventing the shortening of weekend visits. In *Long v. Norris*, 929 F.2d 1111 (6th Cir. 1991) the court held that Tennessee prison rules created a due process liberty interest in being able to visit which included the length of visits, visiting hours and that the strip searches of visitors and prisoners would only be conducted if there was good cause to suspect a rules violation had occurred. "Because the plaintiff's visitation rights were mandatory and could not be removed without good cause under the Tennessee prison regulations, they were liberty entitlements under the fourteenth amendment. Threats to remove this visitation right, in retaliation for the visitors' refusal to submit to an illegal strip search, violated clearly established law."

Likewise, courts have held that Fla. Admin. Code 33-5.006 and 33-5.007 create a due process liberty interest by setting forth both specified, substantive predicates and mandatory language concerning the conditions that must be met before visits will be denied. Thus, Florida prisoners can reasonably expect visits to be allowed absent the occurrence of one of the listed conditions. In this case, a death row prisoner convicted of killing a prison guard while assisting an-

other prisoner's liberation had been denied visitation with his girlfriend. The court found reason to believe the denial was in retaliation for the fact that Van Poyck was serving time for killing a guard rather than any legitimate security reason, it denied the defendants' qualified immunity from money damages. See: *Van Poyck v. Dugger*, 779 F. Supp 571 (MD FLA 1991).

For Washington state prisoners, the ninth circuit in *Mendoza v. Blodgett*, 960 F.2d 1425 (9th Cir. 1992) held that WAC 275-80-930 and visiting rules at the Penitentiary in Walla Walla created a due process liberty interest for both prisoners and their visitors. "Visiting rights may be suspended 'only after a finding of guilt pursuant to a regular disciplinary hearing.'" Written notice must be given to both the prisoner and the visitor. In this case, Mendoza was cleared of wrongdoing (alleged drug smuggling) but his visiting with his wife remained suspended. The court held this was allowed because a visitor may violate prison rules without the prisoner's knowledge or consent. In this case, Mrs. Mendoza was not a party to the suit and her husband could not assert her rights for her. Thus, in litigation involving visitor's rights the prisoner and the visitor should jointly file suit.

Just as prison officials can determine whether prisoners can receive visits at all, they can also determine if they can receive visits with certain people. In *Doe v. Sparks*, 733 F.Supp 227 (WD PA 1990) the court struck down a county jail rule which prohibited visits by prisoner's homosexual lovers. The court held that while such a ban was probably constitutional, in this case it was undercut by so many other factors that it could not pass constitutional muster. In striking down the policy the court relied on the Supreme Court's "reasonableness" standard from *Turner v. Safely*. Many prison rules are downright sexist, in Florida, for example, prisoners cannot have married women on their visiting list unless they are related, see *Van Poyck*, above. The federal Bureau of Prisons (BOP) does not allow its captives to visit with people

Visiting Rights (continued)

unless they knew each other before incarceration. Needless to say, for prisoners serving lengthy sentences or who had been underground for substantial periods before capture this is tantamount to no visits at all.

A frequent means of harassing visitors is subjecting them to pat down or strip searches. A strip search is the most intrusive and involves the disrobing of the person being searched. It is interesting to note that persons arrested for misdemeanor offenses and booked into jail cannot be strip searched absent particularized suspicion by jail officials that the person does in fact possess contraband. See: *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984) and *Mary Beth G. V. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983).

While some prisons have signs posted at the entrance stating that visitors are consenting to be strip searched upon request by prison officials merely by entering prison grounds, the courts have repeatedly held otherwise. Every court to consider this issue has held that reasonable, particularized suspicion that the individual visitor is attempting to smuggle contraband is required before the visitor can be searched; a consent by the visitor to be searched is immaterial.

In *Daugherty v. Campbell*, 935 F.2d 780 (6th Cir. 1991) a Tennessee prisoner's wife was strip searched and had her car searched by prison officials. In order to visit her husband she was forced to sign a "consent" to the search. The court held that prison officials lacked reasonable suspicion to believe any wrongdoing had occurred and denied them qualified immunity.

Smothers v. Gibson, 778 F.2d 470 (8th Cir. 1985) involved a 72 year old visitor to the Arkansas DOC who was strip searched 7 times in eight years with no contraband being found. Prison officials had relied on state law and DOC rules to conduct indiscriminate strip searches of visitors. The court held these rules were unconstitutional and prison officials were not entitled to qualified immunity for their actions. It also held that an anonymous tip was not enough to justify a strip search.

Being searched *after* a visit, when the visitor no longer poses a threat to

prison security requires a warrant from a court of competent jurisdiction. See: *Marriot by and through Marriot v. Smith*, 931 F.2d 517 (8th Cir. 1991).

The fourth amendment requires reasonable suspicion to search a prison visitor. This means prison officials "must point to specific objective facts and rational inferences that they are entitled to draw from those facts in light of their experience..." "Inchoate, unspecified suspicions fall short of providing reasonable grounds to suspect that a visitor will attempt to smuggle drugs or other contraband into the prison."

"...such insubstantial 'hunches' based on individual perceptions rather than independent, articulable facts only invite intrusions on fourth amendment rights." Generalized suspicion is not enough, prison officials must have reasonable cause to believe that drugs or contraband will actually be concealed in the particular place they decide to search. Physical proximity to, or association with another person suspected of smuggling activity does not provide an independent basis for a strip search. In this case, the court held that an uncorroborated, anonymous tip did not satisfy the reasonable suspicion standard and thus violated the fourth amendment. See: *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982).

Strip searches of visitors in retaliation for the prisoner's activities also violate the fourth amendment and may require a trial. In this case a prisoner told investigators that the warden had supplied him with drugs in response to their questioning. Apparently they were not amused and strip searched his daughter when she came to visit him. The court held that the daughter's consent to be searched was invalid because officials lacked reasonable suspicion to carry out the search. See: *Cochrane v. Quattrocchi*, 949 F.2d 11 (1st Cir. 1991).

What should a visitor do if faced with a demand by prison officials to be strip searched? If the visitor is actually carrying contraband they should refuse to be searched. Anything turned up by the search will be used to justify the search whether there was reasonable suspicion for the search to be conducted in the first place or not. Discovery of contraband will likely subject the visitor to criminal charges and the prisoner to disciplinary action by prison officials.

In most cases, visiting privileges will be suspended. By refusing to submit to the search the door is left open for litigation challenging the search and subsequent denial of visiting privileges. This is far better than challenging a criminal conviction or carrying out civil litigation where prison officials actually did discover contraband.

On the other hand, if the visitor is not carrying any contraband they should consent to the search and then file suit. Courts have been willing to award hefty damages in strip searches of visitor's suits and the law is well enough established at this point that prison officials will not be able to get qualified immunity if they lacked reasonable suspicion for the search. In *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985) the court upheld an award of \$177,040.00 in damages to a prison visitor who was strip searched on three occasions. The plaintiff was a jail visitor and searched pursuant to a jail policy which required the strip searching of all visitors, including infants and children, with no individualized suspicion. That the plaintiff had consented to be searched was immaterial. "Submission to the searches under these circumstances cannot properly constitute consent because her access to the jail was impermissibly conditioned on that submission." It was immaterial that she had no right to visit. Prison and jail officials cannot condition visiting privileges to submitting to unconstitutional strip searches, it is the choice itself which is unconstitutional. Given the state of the law and potential for high damages, aggrieved visitors shouldn't have too much trouble finding counsel willing to take the case on a contingency basis.

Visitors may have more rights or higher damages available under state law in their particular state. Readers should research this avenue before deciding to file suit in federal court.

The actual conditions of visiting vary widely from state to state and prison to prison. Visiting is not free from the arbitrariness which infects every other aspect of prison life. *PLN* has received letters from prisoners in Ohio where prisoners are incarcerated and punished for putting their arms around their wives or girlfriends. It is also used to blackmail and harass prisoners, for example, in 1989 I was placed in segre-

gation two days before my parents arrived in Monroe, WA for their annual visit with me. Prison officials conditioned my release from segregation, and being able to receive a trailer visit and contact visits with my parents, on my becoming an informant. When I refused, they transferred me to the Penitentiary which made visits from friends and family all but impossible due to its remoteness. This is a far from uncommon occurrence.

Then there are the other things which contribute to discouraging visiting. Dress codes imposed on visitors which are sexist and discriminatory. For example, the Washington DOC requires that female visitors wear bras, the ultimate symbol of male sexist domination. Readers will note that visitor dress codes may also be subject to litigation because "the right to dress as one pleases is among the panoply of liberties protected by the fifth and fourteenth amendment to the United States Constitution." *South Florida Free Beaches v. City of Miami*, 548 F.Supp 53, 59-60 (SD FL 1982). The right to dress is also part of the right to free speech. See: *Tinker v. Des Moines*, 393 U.S. 503, 509, 89 S.Ct. 733, 738 (1969) and *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786 (1971). Given the fact that the courts are more sensitive to the issue of women's rights and the disparate impact such prison dress codes have on women visitors such suits may well prevail. Of course, it is the visitor that must bring the suit as the prisoner lacks standing to file it.

Other areas of visiting and the legal rights attached to it will be explored in future issues of *PLN*. Readers should bear in mind that litigation is not always the best nor most effective means of challenging visiting conditions. Because they impact free citizens, i.e. voters, appeals to elected officials, complaints to senators and representatives, etc., may be more effective in the short run to resolve problems. Prisoners also suffer from what I call "The Lazy Pig Syndrome." This means that if enough people complain long enough and loud enough about something they will change it because they get tired of responding to the complaints, phone calls, grievances, etc., around a given issue. While prisoners are usually easily ignored senators, governors, other agencies and members of the community are not. Responding to these complaints cuts into coffee and donut time which may lead to effective results. We are always interested in learning of readers' successful struggles on these and other fronts which have a national application.

A Tomb In Columbia

By Raul Zibecchi

[The following article appeared in the December 10, 1993, edition of the Uruguayan weekly Brecha. It was translated and edited by PLN Editor Paul Wright. Given the fact that tens of thousands of Americans languish in prison as casualties in the "War on Drugs" we think this article may interest our readers given the fact that the mainstream media contains little or no serious analysis of U.S. drug policy and its consequences.]

Finally, Escobar achieved his goal: "To have a grave in Columbia before a cell in the United States."

Surrounded by musicians of the National Athletic Club of Medellin playing his favorite song, "The King," by Jose Alfredo Jimenez, whose lyrics proclaim "but I continue being the king," and accompanied by thousands of followers who sang the praises of their benefactor, Pablo Escobar was buried in Medellin after having unnecessarily exposed himself by making phone calls to his family or having been a victim of informants.

Perhaps the truth will never be known, but what is true is that the most wanted man in the world, pursued for years by the Search Group consisting of more than 2,000 soldiers, fell in a rather simple manner after having escaped his captors on innumerable occasions. The masterwork of Pablo Escobar was the creation of the Medellin Cartel. The DEA referred to it as "the most important criminal organization

in the world." The rest of the cartel's organizers find themselves dead or in prison: the Ochoa brothers detained in Colombia; Carlos Lehder in a high security prison in the United States and Gonzalo Rodriguez Gacha killed in a shoot out with Colombian security forces. The Medellin Cartel which came to import 80 percent of the cocaine consumed in the United States, began its decline in August of 1989 when, after the assassination of presidential candidate Luis Carlos Galan, then President Virgilio Barco initiated a total war against the cartel.

Escobar, who had a six million dollar price on his head, failed in his attempt to make a respectable reputation for himself and re integrate himself into Colombian society, even though he did come to hold a seat in Congress. In May of 1984, Pablo Escobar, Jorge Luis Ochoa and a group of Medellin Cartel members met in Panama with Colombian ex-president Lopez Michelsen and the attorney general of president Belisario Betancur. They proposed to dismantle their installations, not traffic in drugs and repatriate 2 billion dollars a year to the Colombian government in exchange for an amnesty and the annulment of the extradition treaty signed with the United States in 1980.

The United States' reaction was radical and they refused to recognize the cartel as a political entity, fearing that with their vast economic resources they would buy the country. Pushed by the DEA, Betancur's government unleashed a vast operation, dismantling 19 jungle laboratories which employed a thousand workers.

In fact and deed, the DEA and American anti-drug strategists boycotted the accord and began pressuring the Medellin capos until they committed the grave error of killing Galan, beginning the definitive encirclement and destruction of the cartel. In these four years the cocaine business completely remodeled itself: the Medellin cartel began its decline, being replaced by the Cali cartel which today controls 75 percent of the production and export of cocaine.

The DEA and factional powers of Columbia weaved an alliance with the Cali cartel, Escobar's rival and antago-

Tomb in Columbia (continued)

nist. After his escape from the Envigado prison on January 22, 1992, the Cali cartel organized and financed the clandestine group Los Pepes (People Persecuted by Pablo Escobar), led by Fidel Castaña, one of the most fearsome paramilitarists of the extreme right-wing. Dozens of Escobar's properties were burned down and many of his associates were killed. All analysts agree that Escobar's death will not end cocaine trafficking but will probably reduce the levels of violence.

The marked differences between the Medellin and Cali cartels have made American strategists more inclined to tolerate the latter while trying to destroy the former. As long as Escobar and his colleagues dedicated themselves exclusively to the cocaine business there were no problems; above all, as long as they were willing to finance paramilitary groups to confront leftist guerrillas.

The problems arose when they sought to occupy a place on the political scene, building themselves a social base and threatening the Colombian oligarchy's positions. Because of their marginal social origins, they were never accepted in respectable society. While their Cali adversaries, linked to the ruling class, have been able to build solid alliances with the powers of state without frontally challenging the DEA and adopting a low profile which allows them to stay in business and not enter into open contradiction with the Americans.

So, why the emphasis on the Medellin cartel? According to Alain Labrousse, director of the Paris based Geopolitical Drug Observatory: "The United States does not really try to finish trafficking in cocaine and other drugs... The DEA's policy is to mount operations to either control or destroy them." Cocaine has become an indispensable economic object for the international financial system. "The capital accumulated by the drug trade corresponds with the same capital mass of the Latin American debt and plays the same role. The financial system requires ever greater amounts of fresh capital and narcodollars are like magic capital, it accumulates rapidly and moves swiftly. A clandestine capital

controlled by the secret services, which allows the financing of covert operations, as happened with the Nicaraguan Contras case. All the profits taken from the trafficking are invested in the war in Central America through the Anti-Castro mafias in Miami who worked for Escobar and the Ochoas" concludes the Observatory.

In this sense, the death of Pablo Escobar culminates a process which began in the 1980's and which required the Medellin cartel's neutralization: the subordination of the cocaine business to the national security interests of the United States, destroying rebellious elements which were difficult to control or too ambitious, like Escobar.

The Cali cartel is preparing to pick up the inheritance. Much quieter and more prudent they have learned from Escobar's mistakes and are prepared to operate quietly, like the Asian heroin and opium mafias. The future scenario is likely to be as follows: the division of labor will allow the drug traffickers to continue their profession, but will leave the hands of the Colombian state free to exercise its monopoly of violence against the leftist guerrillas while coca dollars continue oiling the national and international economy without interfering with the objectives of American foreign policy, which has won an important victory, limiting the narco's power and subordinating the enormous profits from the business to their interests. With Escobar dead the cocaine business has a brilliant and much less conflictive future.

Social Works (and others)

Son of an orchard keeper, a car thief in his adolescence, Pablo Escobar came to be one of the richest men in the world. Asked about the origin of his enormous fortune, he would respond: "The majority of great millionaires have begun from nothing. But it is precisely this which makes them legends, myths and an example for the people. To make money in a capitalist society is not a crime but a virtue."

One of Escobar's most peculiar characteristics, which he shared with very few of his colleagues, were the works of charity in support of the poorest communities of Medellin and the region of Antioquia. Escobar's star project was called "Medellin without homeless," it was begun in 1982 and consisted in the

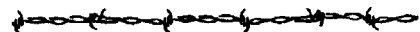
construction of 2,000 homes for the city's poor families. The project ultimately ended with only 500 homes, but is considered by many to be a symbol of the drug traffickers capability for civic leadership. He also built, illuminated and supplied 80 sports stadiums in Medellin and surrounding communities, he lit the National Stadium of Medellin, planted 50,000 trees in 50 Medellin neighborhoods, he built schools and fixed broken sewers, he lit entire neighborhoods and opened his immense zoological park to the public, with free admittance because, he would say: "the people cannot pay to visit what is theirs." So that the visitors would not forget the origins of his fortune, in front of the zoo's entrance he placed on a pedestal the first airplane that he used to smuggle cocaine into the United States.

The cocaine capos have created a base of support not only above with politicians, bureaucrats and the military, but also below with the inhabitants of the slums. An enthusiastic follower wrote in *Civic Medellin*, a daily newspaper financed by Escobar, that "there exists in Columbia two kinds of bourgeoisie. That...which made their capital at the expense of the work of millions of Colombians only to invest it in the United States or Europe... and the other class of bourgeoisie, which invests in Colombia due to their concern for the masses' misery. Pablo Escobar belongs to the latter."

In any case, Escobar and his associates were able to build a broad social base faced with the incapacity of the Colombian state to supply the population's necessities. A social base loyal and unconditionally obedient to its leader, from whom they expected material support and to whom they owed submission. From these sectors came the majority of the sicarios who blindly obeyed the Medellin cartel's murderous orders. In 1981 more than 200 cocaine traffickers, headed by Escobar and Carlos Lehder, founded the group Death to Kidnappers (MAS) to avenge the kidnappings carried out by leftists guerrillas. This group, composed of army officers and young assassins, is responsible for thousands of murders of union leaders and leftist militants, above all those of the Patriotic Union (UP), the legal organization of the Communist Party and FARC (Columbian Revolutionary

Tomb in Columbia (continued)

Armed Forces). The alliance between drug traffickers and sectors of the armed forces fiercely fought the guerrillas of the FARC and the ELN (National Liberation Army) based in the mid-Magdalena valley, provoking a true massacre. The deaths of important political leaders, like the liberal Luis Carlos Galan and UP candidate Jaime Pardo Leal were personally ordered by Pablo Escobar. The murders of M19 leader Carlos Pizarro and the communist Bernardo Jaramillo are also attributed to the orders of the Medellin cartel, advised by paramilitary groups, even though in the opposition ranks these crimes are directly attributed to the state's security forces.



Consent Decree Modified to Permit Racial Segregation

In 1988 a prisoner at the Southern Ohio Correctional Facility (SOCF) at Lucasville, OH, filed suit challenging the prison's practice of assigning prisoners to cells based on their race. This practice led to the racial segregation of prisoners. The court appointed counsel in the case, a class was certified and eventually a consent decree was negotiated. The consent decree mandated that cell assignments based on race were to be terminated and instead random cell assignments were made. The only exceptions were in cases where the warden or his designee found that racial segregation of a particular prisoner was necessary for security reasons.

In April, 1993, SOCF prisoners rebelled leaving 9 prisoners and one guard dead. One of the conditions for their surrender eleven days later was that the consent decree in this case be reviewed stating that the policy of forced integrated celling had caused tensions which contributed to the events leading to the rebellion. This case comes from the court's review of the de-

cree and the prison officials' motion to modify the decree to permit the racial segregation of prisoners.

Prison officials maintain they are unable to continue random, integrated celling because the files and records of SOCF prisoners were destroyed during the rebellion leaving them no way of determining prisoners' security status. Thus, they seek to racially segregate prisoners at SOCF until such time as they have reconstructed the records. The prisoners' lawyer argued that because racial segregation is unlawful the defendants should either single cell the prisoners, transfer them to other Ohio prisons or begin their early release if the state cannot house them in prison in a constitutional manner.

District Judge Spiegel ruled in favor of prison officials, noting that the supreme court has held that racial segregation is unlawful even in prison. Other courts have ruled that segregation based on race is permissible as long as prison officials assert a legitimate security interest. Applying the supreme court's "reasonableness test" under *Turner v. Safely* Judge Spiegel concluded that even racial segregation, which violates the constitution, can be permitted as long as prison officials assert a security reason. Because Ohio's prisons are filled to 178% of their capacity there is no room to single-cell prisoners, either at SOCF or elsewhere, and releasing them early is not even discussed by the court.

This ruling permitted the temporary modification of the consent decree until such time as the prisoners' records are reconstructed. The opinion in this case is a very narrow one that is fact specific to SOCF and the rebellion aftermath but may be useful to those seeking to either modify consent decrees or to challenge racial segregation in prison.

Judge Spiegel concludes the opinion by stating it should not be read as condoning segregation nor as a weakening of the court's resolve to eliminate racial segregation throughout society (of course, the fact that minorities are disproportionately confined in American prisons indicates segregation of another sort,) even in prison. And that eventually the full terms of the consent decree eliminating race based cell assignments at SOCF will be implemented. See: *White v. Morris*, 832 F. Supp 1129 (SD OH 1993).

Eighth Circuit Clarifies Retaliation Standard

George Goff is an Iowa state prisoner. On January 15, 1990, another prisoner at a medium security facility reported being stabbed. Confidential informants allegedly told prison officials that Goff was the culprit. On January 19, 1990, the prison's warden and deputy warden were served with lawsuits challenging conditions of confinement at the prison. Goff was involved in initiating the lawsuit and had been approved for transfer to a minimum security prison on January 24, 1990. On January 23 he was brought to the Iowa State Penitentiary (ISP) and questioned about his involvement in the stabbing. Goff refused to speak to prison investigators and was placed in segregation that same day. On February 9, 1990, he was infracted for assaulting the prisoner. He was found guilty at the hearing and sentenced to 15 days of detention, loss of one year's good time, and a year in a maximum security cell, of which he served 225 days.

Goff filed suit under § 1983 claiming that both the transfer and infraction were in retaliation for his having exercised his right of access to the courts by suing prison officials. After a trial, the district court ruled in Goff's favor that the transfer and discipline had in fact been imposed in retaliation for having sued prison officials. The court awarded Goff \$2,250 which came to \$10 a day for each day he actually spent in segregation. Prison officials appealed and the court of appeals for the eighth circuit reversed and remanded for a new trial holding that the trial court had not applied the correct standard of review for prison retaliation cases.

The court begins by stating the well known principles that prison officials may not retaliate against prisoners for filing legal actions in the exercise of their constitutional right of access to the courts. The forbidden retaliation includes both transfers to other prisons as well as disciplinary actions.

The district court applied the standard enunciated by the Supreme court in *Mount Healthy City School Board of*

Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1974). *Mt. Healthy* involves an employer's refusal to renew a teacher's contract in retaliation for the teacher's exercise of his first amendment rights. Under *Mt. Healthy* the plaintiff has the initial burden of showing that his constitutionally protected conduct was a motivating factor in the employer's decision not to rehire him: then the burden shifts, and the defendant must prove by a preponderance of the evidence that it would have reached the same decision in the absence of the protected conduct.

The appeals court held that the appropriate standard for retaliation cases in the eighth circuit is *Murphy v. Missouri DOC*, 769 F.2d 502 (8th Cir. 1985) in which the prisoner must prove that retaliation was *the actual motivating factor* for the transfer. The court notes that it has acknowledged *Mt. Healthy* but has consistently applied the "but for" standard where the prisoner must show the retaliatory action would not have been taken "but for" the constitutionally protected conduct.

"Finding that an impermissible retaliatory motive was a factor is insufficient to establish a claim in a prisoner retaliatory transfer case." The district court thus erred by ruling that prison officials had not shown by a preponderance of the evidence that Goff would have been transferred anyway absent his litigation.

Noting that prison officials cannot discipline prisoners for the exercise of their constitutional rights the court held that "if the discipline which the prisoner claims to have been retaliatory was in fact imposed for an actual violation of prisoner rules or regulations, then the prisoner's claim that the discipline was retaliatory in nature must fail." The appeals court held that the district court did not properly apply the "some evidence" standard in reviewing Goff's claim that the disciplinary charges were false because the lower court stopped its analysis once it concluded the charges were retaliatory.

The case was remanded to the lower court for further proceedings. See: *Goff v. Burton*, 7 F.3d 734 (8th Cir. 1993).

PCP Responds to Allegations of Gay Persecution

By Paul Wright

Since we began publishing *PLN* we have reported on struggle and conditions affecting political prisoners of diverse movements, groups and parties around the world, to include Palestinian, Irish, Puerto Rican, New Afrikan, Anti-imperialist and Peruvian prisoners to name a few. Generally this reporting has met with interest and approval from our readers because *PLN* is one of the few publications that covers this type of news. Our coverage of struggle by political prisoners of the Communist Party of Peru (PCP, also known in the mainstream media as the *Shining Path*) has been a bit more controversial.

In the August, 1992, issue of *PLN* we printed a letter by Lofofora Contreras who claimed that the PCP persecuted gays and thus shouldn't be supported. At the time we responded to his concerns. We contacted the PCP on this matter but did not receive their reply in time for that issue. Mr. Contreras wrote us a follow up letter which we print below. We sent a copy of the letter to the PCP for their response which we include. We apologize for the delay in printing the letter and article on what has become, at least in some circles in the U.S., a pressing issue. The delay was due to awaiting a response from the PCP which, due their situation, slows communication.

On a side note, *PLN*'s articles sympathetic to the PCP have resulted in difficulties renewing a grant from Resist. We eventually obtained the grant. Support for revolutionary struggles, and their prisoners, is usually controversial at the best of times. We hope the following adequately responds to comrade Contreras concerns as well as helps discredit the allegations against the PCP that they persecute gays.

Contreras writes: *In the August, '92 issue of PLN there appeared a letter by me alleging that the Shining Path revolutionary organization in Peru has a practice of killing transsexuals, transvestites, gays and lesbians in the course of their revolutionary struggle. It was responded to, in the same issue, by the editors, who examined the claims. Other persons have offered comments surrounding this matter. By the reaction, there appears to be a degree of uncertainty among some persons as to the underlying purpose of my letter. This is an attempt to clarify the issues.*

First and foremost, my letter was not a critique of revolutionary struggle. Let there be no question about it: I definitely support the revolutionary struggle and am intimate with its disciplines. I consider myself a part of it; all prisoners should considering the social and economic forces that contribute to crime and political apathy among lower class populations, who make up the vast majority of prisoners everywhere. The underlying causes of crime are an equal issue with our conditions of confinement because they both affect us adversely as persons of a class and cause us to protest in a number of ways against a common entity. We all come from the same social class of oppressed persons and have a common enemy, though some refuse to see this truth and prefer to remain mental slaves. Revolutionary resistance has become a survival instinct of many cultures of the world as a result of capitalist exploitation and it's ultimate manifestation: imperialism. Whether in North America, Africa, Asia, Latin America, the Caribbean, Europe, the Middle East, Australia, the Pacific Islands, we are all intimate with the genocide, racism, colonialism and neo-colonialism, slavery, sexism, discrimination and greed of capitalism and imperialism and all the suffering that they cause.

Nor is my letter a denunciation of the Shining Path, whom I've always considered to be in the forefront of revolutionary struggle in the American theater. I have been well aware of them since their inception, but it was only recently that I received a flow of information alleging that they persecute transsexuals and gays. This source is not of the conventional media, here or elsewhere. The information relied on comes from sources in Peru itself. I have also been in harmony with the Cuban revolution for decades but have become very concerned about first hand accounts of the persecution and exile of transsexuals and gays there.

Continued on page 13

Voices from the Chowchilla Women's Prison

By Judy Greenspan

Women in prison are entitled to the same community standard of care that people have outside. However, just the opposite is true at the Central California Women's Facility at Chowchilla, California (CCWF). The CCWF is probably the largest women's prison in the country.

The Facts

- There are over 3,000 women incarcerated at CCWF. Approximately 100 are known to have HIV.
- There is no HIV/AIDS medical doctor on the staff, and no routine exams or clinical follow-up.
- The prison just hired a gynecologist. The waiting time is several months. There are women with level four pap smears who are not receiving follow-up care.
- The infirmary is unlicensed. The prison doctor is a pediatrician with little knowledge of women's health care needs. Guards with an elementary first aid course (MTAs) dispense medication and diagnose illnesses. Recently 450 women prisoners signed a petition protesting abusive treatment from MTAs.
- There is no confidentiality. All "known" HIV+ women live on C Yard. A xeroxed list of women with HIV was circulated on the prison yard that had been left out on an administrator's desk. Because of the ignorance and stigma surrounding HIV, many women refuse to identify as HIV+ and therefore receive no treatment. There are big signs in every yard, "Beware! There are HIV infected inmate persons housed in this facility!"
- The only HIV/AIDS education is given by HIV+ women prisoners who have set-up an informal peer education program. The Program Administrator hordes HIV/AIDS education brochures in her office. She says she does not have time to distribute them to the women. Women who request material from the outside agencies have their mailings confiscated.

- Women are discouraged from being tested for HIV. There is no pre-test and little post-test counseling.
- Women with HIV are "medically restricted" (not allowed to work). Therefore they do not earn the same good time credits as other prisoners and serve longer sentences.
- A pregnant woman lost her baby when the medical staff diagnosed her early labor as "a bladder infection."
- Another woman suffered a painful death from an untreated brain tumor. The medical staff told her she had migraine headaches and was faking seizures.

Excerpts from HIV+ women at Chowchilla Prison

"I received a package of literature on HIV/AIDS in May 1993. Someone decided they did not like the letterhead and sent it back. I got no notice."

"I'm 2 weeks from the date I parole and I still haven't seen a doctor or anyone from the medical staff. I'm scared."

"Four of us have been trying to educate other inmates throughout the facility. The institution always puts some kind of obstacle in our way. But I keep on trying, I won't give up. I realize I am only one person, but someone will hear me sooner or later."

Campaign to free Betty Ross

One of the most distressing stories is about Betty Ross, a prisoner with AIDS, who was just denied compassionate release by California Department of Corrections Director, James Gomez. Joann Walker, A prisoner and peer educator, wrote to us about Betty's case:

It is this PWA's opinion that everyone has a right to die with their family around. No one should suffer death alone or with strangers. Far too many PWAs are left to die in what we call the penal system. This system is a murderer of people with AIDS. Too little medical care, too little education, no confidentiality, too small diets and no compassion at all. The list just gets longer. We, the incarcerated women of the Central California Woman's Facility, feel deeply that Betty Jo Ross should be given compassionate release.

Betty is suffering from and has been diagnosed with AIDS--dementia, MAC, CMV retinitis--and has been told that she has less than six months to live. Betty has a T-cell count of one.

Director Gomez has used the excuse of Betty's criminal record to deny her early release from prison. Betty has been this writer's cellmate for over two weeks. I have not seen any assaultive behavior or outbursts during this time. I have seen a woman who is very ill and has a hard time walking around. Betty is almost blind. Betty is no threat to anyone and should be allowed to live her last days on the outside with her mother and four children. Over 1,000 women prisoners at CCWF signed a petition demanding that Betty be set free!

Please help us in this struggle

- 1) Write to Director James Gomez. Demand that Betty Jo Ross, #W49772, be granted early release.

Director James Gomez
California Department of Corrections
POB 942883
Sacramento, CA 94283

- 2) Get involved in the Coalition to Support Women Prisoners at Chowchilla. We are planning a demonstration on Jan. 15 outside the prison. Call (510) 530-6214

- 3) Send letters of support to:

Joann Walker
#W17572, C509-19-2L
P.O. Box 1508
Chowchilla, Ca 93610

For more information

"Voices from Inside: Prisoners Respond to the AIDS Crisis," produced by the Prison Issues Committee of ACTUP/ San Francisco, is a collection of writings by prisoners, many of whom are HIV+ and/or peer educators. Copies may be obtained by sending \$4.00 (\$3.00 + \$1.00 postage and handling) to: Prison Issue Committee

ACTUP/ San Francisco
POB 14844
San Francisco, CA 94114

The booklet is free to prisoners.

PCP and Gays (continued)

My overall objection was not to political coverage per se, but to persons identifying themselves as revolutionaries who are anti-transsexual/transvestite/gay/lesbian/bisexual. Unfortunately, these sort of attitudes exist today in some revolutionary circles. But as contradictions heighten and consciousness expands some of us have been able to crystallize our analysis of class and persons and adjust our program accordingly. I believe this is what Lenin meant when he said, in his time, that in the future there will be "forms of struggle that we are now unable to foresee." For the record, the Bolsheviks did not persecute gays.

Since my letter appeared in PLN I have been informed that Shining Path denies that they persecute transgendered or gay persons. This continues to conflict with our own information. The fact that they may not advertise persecution of us is unimpressive. Prisons do not advertise it either, yet they persecute us. Similarly, the fact that a professor familiar with Peru has been unable to confirm reports of Shining Path persecution of our kind does not lay to rest our claims. With all due respect to Professor Andreas, we doubt if she has contacts with the Movimiento Homosexual de Lima (MOHL) or any other group of transsexuals, lesbians, gays or transvestites in Peru, overt or covert, who are witness to Shining Path massacres of our kind. It is not as if such victims are enthusiastic about reporting these incidents in hopes that the police or government, who despise them no less, will protect them, or as if they can make accusations from the grave.

It has been necessary for transsexuals to adopt many forms of economic and social survival, whether by means of prostitution (worldwide) or armed bank robberies to finance sex change surgery (Mexico). It automatically follows that when pressed by forces that seek to annihilate us there are many who will not hesitate to strike back with all of our might and with every resource available to ensure our survival.

We reiterate our allegation against the Shining Path that they inflict hardship, injury and death upon persons based on their gender orientation and

sexual preference. We welcome a formal, official public statement from them that they do not persecute persons of our ilk.

Whatever the debate, we cannot discard other realities. Mr. Guzman, the leader of Shining Path, deserves a fair trial under universally accepted standards, as any person does, and should not be denied his human and legal rights and subjected to cruel and unusual punishment. These are principles of humanity and law that must prevail over political lines.

Lastly, it is not my intent to suggest restrictions on PLN coverage. It would be inappropriate for me or anyone else to attempt this. The press is a historical laser edge of freedom of speech and must play an active role in an open society. It has the responsibility of being a social mirror. It should not be restrained. This point becomes even more important when reporting from gulags, dungeons, control units and concentration camps. The content of the press must always be at the discretion of the editors, and any interference with such discretion is akin to censorship.

In closing, we wish to express our heartfelt appreciation to PLN and Professor Andreas for taking the time, energy and resources to investigate this matter. PLN is a responsible press and truly speaks the concerns of the people.

The Uruguayan weekly Brecha, in its February 12, 1993, edition, reported an interview with Enrique Bossio, a member of the Homosexual Movement of Lima. Bossio is quoted as saying that the PCP has not made gays the focus of any attacks and admitted the important role that women play in the PCP leadership. He stated that the MRTA (Tupac Amaru Revolutionary Movement) has threatened gays in the areas it controls and has killed at least seven gays.

In further investigating Lofofora's claims I contacted both the PCP and Lucien Chauvin, a gay journalist and activist in Lima. Most important however is the PCP's response. I have closely followed the PCP's development and progress over the years and have read virtually all of their materials, communiqués and statements that they have published and made available outside of Peru. The PCP, as even its critics will admit, claims its actions and does not shy

away from admitting responsibility for controversial actions or policies. It is in this light that their response should be viewed.

The PCP states, in response to Lofofora's letter: "We have sought articles on the homosexual question written by our teachers, that is to say Marx, Lenin and Chairman Mao and even others, but we have not found any, nor has our party specifically addressed this question in its documents. In general, it appears to us that there is an excessive preoccupation with this subject in certain revolutionary and militant circles in the U.S. which does not exist in Europe. They are, as we have previously stated, lies and slander which claim that the PCP kills gays for being gay or makes statements against them.

In reality, if we examine what Marxism says, the problem is not one of a person's sexual orientation but rather the class position that they take as everyone is classified as revolutionary, progressive, democrat, revisionist or reactionary. Far from making a lengthy analysis here, we can see that homosexuals have existed in all societies, some from birth, others converted by the social environment in which they live or have lived, the latter seems extremely influential to us. Our view is that homosexual orientation is not an ideological matter but one of individual preference.

It is probable that the PCP has executed a homosexual, but rest assured that it was not done because of their sexual orientation but because of their position against the revolution. It is not difficult to see that in the bars and brothels of Peruvian cities frequented by elements of the police and army some homosexuals work as snitches and collaborators and because of this they accumulate blood debts with the revolution so that when the party seizes that city it will settle accounts with those elements, regardless of their sexual orientation. What then happens is the government and reactionary media report that the Party killed gays or "cleaned up" the city.

We reiterate that the PCP does not attack, slander nor discriminate against anyone because of their sexual orientation. In fact, party membership is open to all who support the cause of communist revolution and the principles of Marxism-Leninism-Maoism, Gonzalo

PCP and Gays (continued)

Thought, regardless of what their sexual preferences may be. We believe that there are other more important and crucial topics over which to open major discussion, such as, for example, that of revolutionary violence, which is concretely the universal weapon of the people's war, etc."

In his letter Lucien Chauvin also confirmed that the PCP does not attack homosexuals because of their sexual orientation. He stated that there were opportunistic elements in the gay community in Peru who had jumped on the anti-PCP bandwagon to advance their own interests. Mr. Chauvin makes clear that he is no supporter or sympathizer of the PCP. He suggested that perhaps comrade Contreras had confused the PCP with the MRTA which, as stated above, has in fact launched well publicized attacks against gays and transsexuals in the areas of Peru that it maintains a presence.

I receive and read a variety of publications from all over Latin America. Most are liberal in outlook and also do not support the PCP yet aside from the above article in *Brecha*, none have reported one way or the other on any persecution of gays by the PCP. Given the leadership role that women have in the PCP, it is unique in this respect among Latin American Communist parties, and given their revolutionary program for social change there is no reason to believe the allegations of gay persecution made against the PCP.

Comrade Contreras is well justified in his concern of whether or not the PCP is discriminatory in its practices against gays. As social revolutionaries seeking a better world the struggle against homophobia is as important as the struggle against racism, sexism and patriarchy as well the primary struggle

against the rule of capitalism. In attempting to track down where this allegation originated from, the first reference was in an issue of NACLA's *Report on the Americas* which mentioned in passing that the PCP persecuted gays. Yet I have never seen any details of any such incidents which can be tracked down and verified, i.e. the date, place and alleged victims.

Rumors and lies of this type advance the interests of the U.S. government, its Peruvian puppets and reaction in general by dividing the anti-imperialist movement and splitting those who would otherwise be opposing imperialist intervention in Peru against the PCP. When an allegation is made it helps to look at who stands to benefit from making it and of course who is making it. Support for the PCP is controversial because they are an openly communist party who are engaged in a peoples' war with the express goal of seizing state power and installing a popular, communist government and economy. But the goal of the anti-imperialist movement in the western imperialist countries who do not define themselves as communists or revolutionaries should be to ensure that their governments do not intervene in Peru. The choice of the form of government in Peru must be made by the Peruvian people, not the U.S. government or the International Monetary Fund. The goal of non intervention is a simple one that should not be influenced by baseless allegations.

Because this issue has received a lot of attention in the alternative press in the us please distribute this article to publications and groups which are interested in this issue. We believe *PLN* is the only publication, other than *MIM Notes*, to specifically address the matter. We hope that this serves to clarify the issue and also open debate and discussion on the issue of homophobia.

News in Brief

[This is a new feature in PLN which will provide short news items related to prisons which while interesting are not big enough to make up an article. If you like this feature let us know and send us news clippings of interest.]

17 Dec. 1993, Moreno Amud, the warden of a maximum security prison in Mexico was arrested on corruption charges after a riot left 15 prisoners dead and 11 injured. The riot occurred after prisoners attacked a group of prisoners that had been extorting and threatening them. The charges against Amud claim that he knew of the extortion activities but covered them up in exchange for bribes... **13 Nov. 1993**, a search of the Carandiru prison in Brazil, which holds 4,850 prisoners, led to military police finding over 350 knives and edged weapons. They also found duplicate keys to the prison, alcohol and drugs. A month earlier prisoners had taken 27 guards hostage to protest cell searches... **19 Jan. 1994**, Michael Mahoney, a prison industries supervisor at the Washington State Reformatory in Monroe, WA was charged in Snohomish County Superior Court with second degree child molestation. Prosecutors claim that Mahoney, 48, fondled a 13 year old girl who stayed at his home. Questioned by police, Mahoney did not deny the sexual contact with the girl but claimed he did not initiate it... **23 Dec. 1993**, a judge visiting a prison in Barquisimeto, Venezuela, was attacked and stabbed four times by a prisoner. The judge was investigating prison conditions and was accompanied by the prisoner's lawyer. Prison officials promised to investigate why the attacker was out of his cell... **17 Dec. 1993**, 23 prisoners escaped from the Sao Paulo, Brazil, jail via a tunnel. Two of the escapees hailed a taxi. Unfortunately for them, the taxi was driven by a moonlighting prison guard who held them at gun point and returned them to the jail. The other 21 escapees remain free... **11 Dec. 1993**, Carroll Hubbard, U.S. Congressman from Kentucky became an FBI informant to investigate bankers and businessmen who contributed to his campaign. He did so to avoid his own prosecution on misuse of campaign funds. "For more than six months, I was an FBI slave," he said..

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News in Brief (continued)

22 Oct. 1993, Ramon Padilla, a Washington state prison guard was charged in Yakima county with three counts of second degree rape, two counts of unlawful imprisonment and one count of indecent liberties. The charges arose after he posed as a policeman and allegedly forced four Yakima prostitutes to have sex with him. The news report is unclear if this occurred in separate incidents or all at once... **20 Dec. 1993**, Daniel-Salustiano da Costa was killed in a mass escape from the Sao Paulo, Brazil, jail. The prisoners overpowered jail guards at knife point, seized their keys and opened the cell doors and escaped. Upon hearing an ambulance siren Salustiano turned his head to look and ran into a light post which killed him. This was the third jailbreak in three months.

100+ Killed in Venezuelan Prison Riots

At least 109 prisoners have died and 54 remain injured after a group of inmates started a fire at Sabaneta prison in Maracaibo, Venezuela, on Jan. 3. Sabaneta prison is racially segregated, with about 800 Guajiro Indians on one side and some 2,000 non-Indians on the other. The fire was apparently started by a group of Guajiros, who attacked the non-Indian side, setting fire to two cell blocks. "It was an act of vengeance that was planned," said prison director Luis Zambrano, explaining that a Guajiro inmate was decapitated on Dec. 30 by the non-Indians.

Oswaldo Espina, an inmate who survived the Jan. 3 incident, said the Guajiros were armed with firearms, Molotov cocktails and knives, but added that the National Guard also attacked with gunfire and tear gas. According to AP, Justice Minister Fermin Marmol Leon did not confirm or deny that the National Guard may have shot some inmates. All the dead are believed to be non-Indians; Maracaibo's Justice Ministry says none of the Guajiros were hurt. Noeli Pocater, a spokesperson for the Guajiros, Venezuela's largest indigenous nation, disputed the official story on how

the incident began: "It's very hard to believe the version that the Guajiros are to blame," she said.

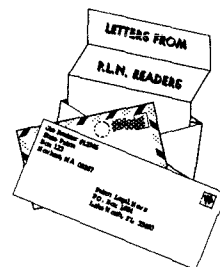
About 40 inmates escaped the next day from Tocarón prison in Maracay, 60 miles west of Caracas in Aragua state; 10 of the fugitives were subsequently shot and killed by the National Guard and another seven were captured, according to Dora Bracho Barreto, the national prisons director. And on Jan. 3, a few dozen inmates began a hunger strike to protest the Dec. 24 killing of a prisoner by a member of the National Guard; by Jan. 5, some 400 more had joined the hunger strike.

According to Agence France Presse, there were 3,600 inmates at Sabaneta prison, though it only has capacity for 800. (An AP article in the New York Times said the prison was built for 1,500 and actually housed 2,500). Overcrowding is a widespread problem; Venezuela's 33 prisons are filled to over seven times their capacity. Attorney General Ramon Escovar Salom accused past governments of having a "lack of political will" to address the situation; he said he had sent investigators to Sabaneta and Tocarón to report on the incidents. After a meeting with Lolita Aniyar, the state governor of Zulia, where Maracaibo is located, Marmol Leon said the prison system would be decentralized and the prisons would be put under the control of the state governments. Sabaneta prison, where 79 people were killed during 1993, is to be remodeled. Marmol admitted that only 9,000 of Venezuela's 26,000 prisoners have been tried and convicted; the rest are awaiting trial. (ED-LP 1/4/94 from EFE, 1/5/94 from AFP, 1/6/94 from AP; NYT 1/5/94 from AP, 1/6/94 from AP)

Prison Takeovers, Austerity Protests Wind Down in Argentina

A wave of prison rebellions throughout Argentina ended on Dec. 22 when inmates in Bahia Blanca reached an agreement with government negotiators. The inmates turned the institution back over to authorities only after they agreed to address the prisoners' de-

mands and promised no reprisals. The prisoners were demanding respect for their human rights, commutation of sentences and a streamlining of the judicial process. (Radio Havana Cuba Latin America Newsline 12/22/93) The prison takeovers began on Dec. 16 when more than 200 inmates took over the facility at Bahia Blanca. At the peak of the rebellion on Dec. 21, close to 3,000 inmates had control of 14 prisons across Argentina and were holding more than 80 hostages, most of them guards. That same day, Justice Minister Jorge Maiorano announced that he would send a bill to the Parliament proposing the reduction of sentences and speeding up of the trial process. On Dec. 21 the Association of the Mothers of the Plaza de Mayo announced its solidarity with the prisoners and condemned the government repression carried out against many of the inmates. (ED-LP 12/22/93 from AFP)



Letters From Readers

[One of the objectives of PLN is to become a forum through which readers can express opinions on what they've read, or to point out issues we should be addressing. Paul and I feel it is important for there to be a dialogue with our readers, especially around matters of disagreement. We are not above criticism, nor do we claim to have all the answers. So give us your feedback and we will print as much of it as there's space for in our letters section.]

Needs Mail Stamping of Prisoner Mail Information

On November 1, 1993, Wisconsin Prisons started to stamp prisoner mail as originating in a prison. We filed for a temporary injunction in the U.S. District Court for the Western District of Wisconsin. On October 28, 1993, the court came back with a dismissal order, stating it was not a violation of the pris-

oners' constitutional rights. Is there any other *PLN* readers that would have information on this that we could use? If there is, could you please send it?

Randy Smith # 097993

P.O. Box 3310

Oshkosh, WI. 54903-3310

[Editor's Note: PLN receives mail from virtually every prison in the United States. Almost all the envelopes indicate the sender is either a prisoner or located in a prison/jail. Those prisons who do not are definitely in the minority nowadays. We recently received a letter similar to yours from prisoners in the California DOC which recently began a similar practice. This practice has been challenged in the courts and upheld as not infringing any constitutional right. Check out your West's Federal Digest for the citations. Not to be unduly pessimistic, but I don't think it is likely that a court will stop the practice given the current state of prisoner rights law.]

Back to the Dark Ages

It sure does look like the prison systems are fading back to the days of the dark ages. With nothing to occupy the prisoner's mind and time except to sit in an 8x10 foot cell and scam on how to get over on someone or something. Instead of trying to teach him a trade so when he or she hits the street they will have some type of help instead of a \$100 dollar check and a bus ticket back to the town you awaited trial in. That is what happens here in the state of Florida.

Even when the man or woman is released from prison here, when they get off the bus they are alone and probably within twenty feet of a package store or a corner where someone's selling dope. There's a definite need for more programs to help the prisoner who does not have a high school education or a pliable trade when released.

M.C. Clearwater, FL.

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Legal News

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Working to Extend Democracy to All

April 1994

Court Rules on Control Unit Law Library Access

Abdul Akbar is a Delaware state prisoner confined in the Maximum Security Unit (MSU) of the Delaware Correctional Center (DCC). The MSU is a control unit for the long-term segregation of prisoners that prison officials allege to be a danger within the general population of the DCC. The MSU is a separate facility within the DCC.

Akbar filed suit alleging that he had been denied access to the courts because MSU prisoners were not allowed physical access to the DCC's main law library. Instead, MSU prisoners were provided with a satellite law library that contained

source package to be evaluated as a whole on a case by case basis. The court noted the important distinction in the availability of materials at the MSU satellite law library as opposed to a prison's sole or primary law library for the entire prison population.

"...the standard to be applied is whether the legal resources available to a prisoner will enable him to identify the legal issues he desires to present to the relevant authorities, including the courts, and to make his communications with and presentations to those authorities understood. Thus, in order for segregated prisoners, who do not have access to an institution's main law library, to obtain legal access of 'equal caliber' to the main library's resources... there must be some means by which documents and materials, which are not themselves available to the segregated inmates, can be identified by and furnished to such inmates in a timely fashion."

"With the availability of basic federal and state indices, citators, digests, self-help manuals and rules of court, along with some degree of paralegal assistance and a 'paging system' through which photocopies of materials from an institution's primary facility may be obtained, we are persuaded that even a prisoner in a segregated unit such as the MSU would not be denied legal access to the courts."

"By identifying these basic research categories, we do not intend to exclude other categories of treatises, digests or other research tools that may be peculiarly appropriate to a particular facility. Nor do we intend that the designated categories that we have suggested cannot vary with the particular institution. The hall-

a limited amount of legal materials. The room was also used as a barber shop and subject to flooding. DCC policy allowed MSU prisoners one hour of satellite law library access per day on a first come, first served basis. It was only open for four hours a day and only one prisoner at a time could use it.

Prison officials would also provide, at no cost, five photocopied citations per week through a paging system where the prisoner would request a specific case. Also available was limited assistance from two staff paralegals, their supervisor and some prisoner librarians.

The district court made extensive findings of fact and ruled that the MSU law library policies and practices were constitutionally inadequate to provide MSU prisoners with access to the courts. The court awarded Akbar \$750 in compensatory damages and \$750 in punitive damages. The court granted injunctive relief ordering prison officials to adopt a new plan to provide adequate legal assistance and/or access to an adequate law library for MSU prisoners. See: *Abdul Akbar v. Watson*, 775 F. Supp 735 (D Del. 1991). Both parties appealed the order and the court of appeals for the third circuit vacated and remanded.

The appeals court ruling held that prison officials were shielded from liability by the doctrine of qualified immunity. Noting that there is very little case law on what law library access is required for control unit prisoners, the court held that prison officials could have reasonably believed that their actions were lawful.

The appellate court noted that *Bounds v. Smith*, 430 US 817, 97 S.Ct. 1491 (1977), requires each prison's legal re-

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Library Access (continued)

mark of an adequate satellite system, which achieves the broad goals of *Bounds* is, in our opinion, whether the mix of paralegal systems, copying services and available research materials can provide sufficient information so that a prisoner's claims or defenses can be reasonably and adequately presented. A court's task in applying the teaching of *Bounds* to any penal institution is not to prescribe the maximum requirements of an optimum library and legal resource facility, but only to determine, as best it can, whether the resources provided satisfy the minimum that *Bounds* requires. We believe that a satellite library of the nature we have described will afford any prisoner in a segregated unit, such as MSU, sufficient, relevant materials to satisfy his constitutional right of access to the courts."

The lack of case law in the area of control unit law library facilities led the court to make the detailed holdings quoted above. In granting the defendants qualified immunity from money damages the court relied on this lack of case law, the historically inexact standard of *Bounds* and the fact that the judiciary itself is unable to agree on the contours and requirements of *Bounds*, to hold that prison officials could not be expected to know that their actions were unconstitutional in this area of prisoner rights.

The court also vacated the district court's injunctive order because Akbar had been released from MSU four months before the trial, thus mooted the case and controversy. See: *Abdul-Akbar v. Watson*, 4 F.3d 195 (3rd Cir. 1993).

Jail Detainees Have Right to Library Access

This case involves a consolidated appeal of one suit by three Wisconsin county jail detainees and one by an Indiana jail detainee. All of the plaintiffs claimed their right of access to the courts was violated because the jails they were held in had no law library, they had no access to persons trained in the law to assist them and they were denied materials such as pens and carbon paper with which to prepare their litigation. Both district courts dismissed the cases. The

court of appeals for the seventh circuit reversed and remanded both cases.

The Wisconsin jail defendants asserted a defense of qualified immunity and maintained they were not liable for money damages because pre-trial detainees did not have a clearly established right of access to the courts. The appeals court gave an overview of its rulings that extended the right of access to the courts to pretrial detainees in 1981 while not specifically deciding how closely jail officials must match prison officials in providing legal assistance to prisoners. The court noted that the provision of criminal defense counsel unable or unwilling to assist detainees or jail prisoners with habeas corpus petitions or civil rights complaints is inadequate to ensure a detainee's right of meaningful access to the courts. The appeals court was unable to decide the issue of qualified immunity in this case because the factual record was not only incomplete, at crucial points it conflicted with the appeal briefs.

One of the Wisconsin plaintiffs was dismissed by the district court for failure to prosecute because he had not signed one of the pleadings. The appeals court held that the district court abused its discretion. Because the defendants were not prejudiced, the proceedings were not delayed, the plaintiffs were *pro se* state prisoners, the plaintiff only failed to sign one document and had obeyed the court's order for over a year before dismissal, the sanction was unduly harsh.

The Indiana plaintiff alleged that the jail law library he had access to three hours a week did not contain basic reference materials or case law reporters. The district court dismissed the claim for failing to allege prejudice because he did not identify the rights violated nor the facts supporting his claim.

The appeals court held that dismissal was in error and that the plaintiff should

have been given an opportunity to amend his complaint. "As a *pro se* litigant, and particularly in light of his alleged lack of access to adequate legal materials or legal advice, Ingram should have been given an opportunity to conform his pleadings to the correct legal standards." See: *Casteel v. Pieschek*, 3 F.3d 1050 (7th Cir. 1993).

Ad Seg As Punishment Unlawful

Greg Stevens is an HIV+ Arkansas state prisoner, he is also missing a finger. Due to his medical condition he received a medical limitations slip which prohibited him from working in the prison fields. He reported to work in the fields and showed the slip to Major McHan, who became angry, tore up the slip and placed Stevens in Administrative Segregation (ad seg) pending a disciplinary hearing on a charge of malingering. Stevens spent eight days in ad seg until the charges were dismissed by the disciplinary committee. After being released from ad seg Stevens received another medical slip. McHan then convinced the prison doctor to change the slip to allow Stevens to work in the fields with one hand.

The case went to trial and the district court made the above findings of fact and concluded that McHan had violated Stevens' due process rights by placing him in ad seg without a hearing. The court awarded Stevens \$500 a day for each day he spent in ad seg.

McHan appealed and the court of appeals for the eighth circuit affirmed in part, reversed in part and remanded. The court agreed with the lower courts determination that McHan's decision to place Stevens in ad seg was capricious and malicious with the express intent to punish. Because of this, Stevens was plainly en-

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ad seg Punishment (continued)

titled to a hearing before he could be placed in ad seg.

The appeals court held that the damages award of \$4,000 was excessive. In reaching this conclusion the court listed rulings from other courts which had awarded damages ranging from \$25 to \$150 per day spent in segregation later found unlawful. The court remanded the case back to the district court for a recalculation of damages. See: *Stevens v. McHan*, 3 F.3d 1204 (8th Cir. 1993).

Kentucky Ad Seg Rules Create Liberty Interest

Kevin Black is a Kentucky state prisoner. While in protective custody he was placed in administrative segregation on several occasions while held at both the Kentucky State Penitentiary and the Kentucky State Reformatory.

Black filed suit alleging that his ad seg placement violated his right to due process. The prison official defendants sought summary judgement which the district court denied. The district court ruled that Kentucky Corrections Policy and Procedure 10.2 (CPP 10.2) grants all Kentucky state prisoners a liberty interest in remaining in the general prison population. The court denied the defendants' qualified immunity and set the case for trial to determine if the periodic reviews of Black's ad seg status were constitutionally adequate.

The defendants filed an interlocutory appeal to the district court's order. The court of appeals for the sixth circuit affirmed.

The appeals court began with a detailed discussion of both the qualified immunity standard and that of stating a claim under 42 U.S.C. § 1983. The court agreed with the lower court that CPP 10.2 creates a due process liberty interest for Kentucky prisoners to remain in the general prison population. This right is enforceable in federal court under § 1983.

Because Black had a right to remain in the general population, prison officials were required to provide him with minimal due process pursuant to *Hewitt v.*

Helms, 459 US 460, 103 S.Ct. 864 (1983). The court held that there was a factual dispute as to whether Black had received adequate due process under *Hewitt*. That issue required a trial on the merits to resolve. The court could not determine if prison officials were entitled to qualified immunity due to the disputed material facts of what due process Black was actually provided. Thus, qualified immunity on summary judgement was not appropriate. See: *Black v. Parke*, 4 F.3d 442 (6th Cir. 1993).

Wolff Hearing Required Before Detainees Punished

Ernest Walker is a pretrial detainee at the Navarro County Jail in Corsicana, Texas. Walker asked a jail guard to open his cell door so he could get some chips to eat. The guard refused and claimed Walker called him an obscene name. The guard placed Walker in segregation. The next day Walker attended a disciplinary hearing which resulted in a sanction of five days in solitary confinement. Walker filed suit claiming that this violated his right to due process of law, he also claimed his legal mail was opened and read outside his presence. The district court dismissed the entire suit as being frivolous under 28 U.S.C. § 1915(d), the *in forma pauperis* statute. The court of appeals for the fifth circuit affirmed in part, vacated and remanded in part.

In considering the segregation claim the court notes that, while not clear, the Supreme Court's *Wolff v. McDonnell*, 418 US 539, 94 S.Ct. 2963 (1974) ruling may apply to pretrial detainees as well as convicted prisoners. *Wolff* sets forth the minimal due process requirements for prison disciplinary hearings which include advance written notice of the charges at least 24 hours before the hearing, a written statement by the factfinder as to the evidence relied upon and reasons for the disciplinary action taken, and an opportunity for the accused to call witnesses and present evidence in his/her defense.

In dismissing the case as frivolous the district court had relied on *Hewitt v. Helms*, 459 US 460, 103 S.Ct. 864 (1983) which is a far more informal hearing than that required by *Wolff*.

The appeals court held that Walker's due process claim has an arguable basis in fact and law and thus, the dismissal was an abuse of discretion. In *Pembroke v. Wood County, TX*, 981 F.2d 225 (5th Cir. 1993) the court had held that use of punitive isolation against pretrial detainees without affording them due process, violates the fourteenth amendment.

The court upheld dismissal of the claim concerning the opening of the legal mail because Walker did not allege that his position as a litigant had been prejudiced by the mail tampering. The allegation that his legal mail was opened and read, but not censored, also failed to state a claim. See: *Walker v. Navarro County Jail*, 4 F.3d 410 (5th Cir. 1993).

5th Cir. Guts Legal Mail Standard

Van Lee Brewer and Claude Harris are Texas state prisoners. They filed suit under § 1983 claiming that prison officials had opened and read their incoming legal mail from the courts, attorneys and government officials outside their presence. They also claimed their outgoing mail to the courts was opened and legal pleadings were removed by prison officials, that legal mail was wrongfully withheld past 72 hours, incoming and outgoing general mail was never received by the addressee and numerical limits were placed on the plaintiff's outgoing mail. The district court granted prison officials summary judgement and dismissed the suit. The court of appeals for the fifth circuit affirmed in part, reversed in part and remanded.

This case will be of extreme interest to Texas prisoners because this decision invalidated several long-standing fifth circuit cases dealing with prisoner's right to uncensored legal mail. This case is a giant step backwards for prisoner rights in the fifth circuit.

The appeals court upheld the dismissal of the plaintiff's claims concerning the opening of their incoming legal mail outside of their presence. The claim was analyzed as both a free speech and access to the courts claim. The court gave a lengthy history of prisoner's right to uncensored communications with the courts and counsel.

In *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976) and *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. 1978) the fifth circuit ruled that a prisoner's right of access to the courts required that their legal mail be

Legal Mail Standard (continued)

opened only in their presence and not be read by prison officials. The appeals court relied on *Procurier v. Martinez*, 416 US 396, 94 S.Ct. 1800 (1974) and *Wolff v. McDonnell*, 418 US 539, 94 S.Ct. 2963 (1974) in reaching this conclusion.

In this case the court specifically overrules its prior decisions in *Taylor* and *Guajardo*. Applying the Supreme Court's "reasonableness" test from *Turner v. Safley*, 482 US 78, 107 S.Ct. 2254 (1987) and *Thornburgh v. Abbott*, 490 US 401, 109 S.Ct. 1874 (1989) the appeals court concluded that it will uphold prison practices that violate prisoner's constitutional rights as long as the practice is "reasonably related" to an asserted legitimate penological goal. Because the plaintiff's did not claim that their ability to prepare or transmit a legal document had been impaired by the opening and inspection, they had not shown an abridgement of their right of access to the courts. "...we must also hold that the violation of the prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights. The appellants... have not stated a cognizable constitutional claim either for a denial of access to the courts or for a denial of their right to free speech by alleging that their incoming legal mail was opened and inspected for contraband outside their presence."

The plaintiffs did better on their claim concerning their outgoing legal mail. Brewer alleged that prison officials opened his outgoing legal mail and removed materials from it, thus preventing a writ of mandamus from ever reaching the district court. The appeals court emphasized that there is still a clear distinction between incoming and outgoing prisoner mail, each governed by a different legal standard. Incoming mail is governed by the more restrictive *Thornburgh* standard while outgoing mail remains governed by the more liberal *Procurier* standard.

The appeals court reaffirmed its previous rulings that prisoners have a right to be free from the arbitrary censorship of their mail. The claim was also sufficient to state claim for violation of the right of access to the courts. The court ruled that prison officials would not be entitled to qualified immunity if Brewer succeeded in proving his claims at trial "...that a

prisoner's right of access to the courts includes his ability to prepare and transmit a necessary legal document to a court has been clearly established for decades." "A prison official... thus should have been aware that arbitrarily preventing a necessary legal document from arriving in court would violate that right."

In remanding the case the appeals court instructed the lower court to address the claims concerning the delay of legal mail, the non arrival of general mail and limits placed on the number of letters mailed out by the plaintiffs. See: *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993).

9th Cir. Explains Review of Religious Claims

Jason Ward is the only Orthodox Jewish prisoner at the Ely State Prison in Nevada. He filed suit under § 1983 claiming that prison officials had violated his right to free exercise of his religion by not providing him with a kosher diet; an orthodox Rabbi; clothes made of a single piece of fabric; not allowing him to have candles in his cell nor a guarantee that he would not be transported on the Jewish Sabbath. The district court ruled in favor of prison officials on all issues after a bench trial.

The court of appeals for the ninth circuit affirmed in part, reversed in part and remanded. The court gave an extensive explanation of the legal standard applied to prisoner's free exercise of religion claims. Anyone litigating this issue in the ninth circuit should familiarize themselves with this opinion.

The court rejected prison officials' argument that all free exercise claims were governed by *Employment Division, Department of Human Resources v. Smith*, 494 US 872, 110 S.Ct. 1595 (1990). The appeals court noted "The Supreme Court has held that *Turner* applies to all constitutional claims arising in prison with the exception of eighth amendment claims."

The court then went on to apply the four factor test of *Turner v. Safley*, 482 US 78, 107 S.Ct. 2254 (1987), noting that prisoners have a right to be provided with sufficient food to sustain them in good health which complies with the dietary laws of their religion, the appeals court

remanded this claim back to the district court for findings of fact.

The appeals court weighed the opportunity that Ward had to practice his religion and held that, due to being the only Orthodox Jew at Ely, his religious practices were so dramatically curtailed that he had no alternative means to practice his religion. The court rejected prison officials' argument that the private opportunity to pray is sufficient to satisfy the *Turner* standard articulated in *O'Lone v. Estate of Shabazz*, 482 US 342, 107 S.Ct. 2400 (1987). Noting: "If it were, the factor would have no meaning at all because an inmate would always be able to pray privately."

The court also expanded upon *O'Lone* by stating that the courts must make factual findings of what is or is not forbidden by a specific religion. This is the distinction "between a religious practice which is a positive expression of belief and a religious commandment which the believer may not violate at peril of his soul. It is one thing to curtail various ways of expressing belief, for which alternative ways of expressing belief may be found. It is another to require a believer to defile himself, according to the believer's conscience, by doing something that is completely forbidden by the believer's religion."

The appeals court ruled that, in making these findings of fact, the district court must consider Ward's challenge to the orthodoxy of the rabbi who testified for the warden. "In religious matters, we take judicial notice of the fact that often the keenest disputes and most lively intolerance exists among persons of the same general religious belief, who, however, are in disagreement as to what the faith requires in particular matters." "...Ward is entitled to argue, with appropriate authorities, that his religious belief is different from the interpretation provided by the witness for the state."

The court also remanded for factual findings by the lower court as to what impact provision of a kosher diet would have on prison administration at Ely. The court also lacked a factual basis to conclude that the denial of a kosher diet was related to a legitimate penological interest. "Although we must give deference to the prison officials' own assessment of the burden on prison operations, we simply cannot accept the warden's assertion on appeal that the disruption would be significant." In its remand instruction the

court ordered the lower court to make factual findings and then weigh these findings under the four prong *Turner* test.

The appeals court affirmed dismissal of Ward's claim regarding being able to keep candles in his cell and not being transferred on the Sabbath. The court held that prison officials have no obligation to provide prisoners with the spiritual counselor of their choice. Because there was no bar or prohibition on Ward seeking his own rabbi, no constitutional violation was present. Likewise on Ward's claim that the prison did not provide him with clothes made from one piece of fabric where he was allowed to purchase his own if he so desired. See: *Ward v. Walsh*, 1 F.3d 873 (9th Cir. 1993).

OK to Disclose Informant's Identity

David Sterling is a federal prisoner. He is also an informant. During the course of disciplinary proceedings against his cellmate, Lawrence Pekoske, Sterling provided information to Bureau of Prisons (BOP) officials under a promise of confidentiality.

Pekoske filed a request to examine his prison records with the BOP under the Freedom of Information Act. The BOP disclosed Sterling's statement after redacting his name from it. Sterling filed suit under 5 U.S.C. § 552a, the Privacy Act (PA), and 28 U.S.C. § 2671, the Federal Tort Claims Act (FTCA) claiming that as a direct result of the disclosure he has faced death threats from other prisoners and emotional distress.

The district court ordered the suit dismissed because Sterling had come forward with no evidence that the BOP had willfully or intentionally disclosed the information that identified him as an informant. The court notes that negligence or handling "...a matter in a disjointed or confused manner" is not sufficient to withstand a motion for summary judgement. There was no evidence to indicate that the BOP had acted in "flagrant disregard" for Sterling's rights as an informant. See: *Sterling v. United States*, 826 F. Supp 570 (DC DC 1993).

AZ Prisoners Have Right to Court Access

Antonio Bustamonte is an Arizona state prisoner held at the Winslow prison. In April of 1992 a riot broke out at the prison resulting in Bustamonte's housing unit being locked down. One of the consequences of the lockdown, in which prisoner's were not allowed to leave their cells, was that it denied the convicts access to the prison law library.

Prison officials set up a substitute system through which prisoners could order legal materials from the law library and receive visits from prisoner legal assistants. Bustamonte filed a writ of habeas corpus in Arizona state court alleging that this system was so inadequate that it denied him meaningful access to the courts. The relief he requested was that he either be provided with law library access or be released from prison. The trial court dismissed the petition holding that a writ of habeas corpus was an improper remedy for a lack of law library access.

The Arizona court of appeals affirmed only because the lockdown had ended, thus mooted the controversy. The appeals court ruled on this issue because it was one of statewide importance which could recur yet evade review.

The appeals court agreed that a writ of habeas corpus is not the proper procedural method to challenge inadequate law library access. The proper means would have been for Bustamonte to seek special action relief in the nature of a common law writ of mandamus. The trial court erred by summarily dismissing the petition and not considering it as a petition for special action. "When an inmate challenges the adequacy of his access to a law library, the trial court should look to the substance, not the form, of the petition." See: *Bustamonte v. Ryan*, 856 P.2d 1205 (Ariz. App.Div. 1, 1993).

Excluding Alibi Witness Unconstitutional

Kelvin Moye is a New York state prisoner. He was incarcerated for stabbing another prisoner. At his disciplinary hearing Moye requested a statement from a prisoner whose testimony would indicate that Moye could not have committed the stabbing. The hearing officer refused to obtain a statement from the witness and found Moye guilty based on the statements of confidential informants. Moye was sentenced to one year in segregation and his administrative appeals were denied.

Moye filed an Article 78 petition in New York state court challenging the denial of his alibi witness at the disciplinary hearing. The state court agreed that his rights had been violated and vacated the ruling. Moye had spent 323 days in segregation by the time the state court issued its ruling. He then filed suit in federal court under § 1983 seeking money damages for violation of his due process rights. The district court granted partial summary judgement to both parties.

The court gave an extensive discussion of the right to call witnesses at prison disciplinary hearings. Because prison officials could not give a rational basis for excluding Moye's alibi witness the court held that the denial violated Moye's right to due process.

The court also gave an extensive discussion of the doctrine of qualified and absolute immunity. Ruling that the defendants were not "impartial hearing officers performing judicial functions" they were only entitled to qualified immunity under *Cleavinger v. Saxner*, 474 US 193, 106 S.Ct. 496 (1985).

While the administrative reversal of prison disciplinary hearings will cure a due process violation, the state court proceedings does not. Thus, a § 1983 action for money damages is permitted after a state court reverses a disciplinary hearing ruling.

The defendants were not entitled to qualified immunity for denying Moye's alibi witness. The defendants did, however, receive qualified immunity for failing to independently assess the reliability of the confidential informants because there is a split within the circuits on this issue and the second circuit has not yet ruled on the matter. See: *Moye v. Selsky*, 826 F. Supp 712 (SD NY. 1993).

Detainees Have Right to be Vermin Free

Two federal pretrial detainees housed under contract in the Allegheny County Jail (ACJ) in Pennsylvania sued jail officials for a wide variety of ailments affecting jail prisoners. Among the issues they filed suit on were: inadequate ventilation, extreme temperatures, excessive noise, use of chemicals and machines in the jail that gave off toxic fumes, unsanitary food preparation and inadequate medical care, among others. The district court dismissed the complaint on the defendants' combined motion for summary judgement and dismissal for failing to state a claim upon which relief could be granted.

The court of appeals for the third circuit affirmed in part, reversed part and remanded the case back to the district court. The appeals court covered numerous procedural issues before addressing the substantive issues of the detainees complaint. Readers should note that while the plaintiffs were federal detainees' they filed suit under 42 U.S.C. § 1983 rather than as a *Bivens* action because the defendants were state and county officials.

The appeals court held that some of the issues raised were time barred, ruling that the statute of limitations for § 1983 actions that arise in Pennsylvania is two years under 42 PA.Con.Stat.Ann. § 5524.

One of the defendants was a pharmacy contracted to provide prescription medications by Corrections Medical Systems, Inc., who was in turn contracted by the jail to provide medical care to the prisoners. The pharmacy was sued because the lice medication they provided to the plaintiffs was ineffective in treating the infestation. The appeals court gave a detailed discussion of the essential elements needed to establish § 1983 liability: the conduct complained of must be committed under color of state law and it must deprive a person of rights, privileges or immunities secured by the constitution or laws of the United States. In this case there was an insufficient connection to establish that the pharmacy had acted as a state agent. The court noted that had the pharmacy contracted directly with the jail or the county to provide its services it would create a genuine issue of material fact on the element of state action.

The district court had dismissed the overall conditions claims because some had already been litigated in an ongoing class action suit. The appeals court reversed on this issue noting: "The court... cannot respond to new or different problems related to those conditions if it deems that, by addressing some conditions at the jail, all conditions have been addressed. Further, it may very well be that only through complaints such as the one under consideration will the court become apprised of the ACJ defendants' failure to comply with prior court orders on conditions that have already been addressed." Thus, the district court should have considered the conditions within the context of the class action suit or consolidated this suit with the class action. To the extent new issues were raised, as well as the claims for money damages, these should have been addressed.

The appeals court held that jail officials had shown deliberate indifference to the plaintiff's medical care by issuing them dirty linen which led to their lice infestations. "...we believe that inmates do have a right to be free of conditions that generate infestations of vermin." Jail officials also showed deliberate indifference to prisoner's medical needs by, first, allowing conditions which led to the plaintiffs having heatstrokes and then, by failing to treat the heatstrokes. See: *Kost v. Kozakiewicz*, 1 F.3d 176 (3rd Cir. 1993).

Infestation Violates 8th Amendment

Several pretrial detainees in the Cook County jail in Chicago filed suit over rodent infestation at the jail. Several of the plaintiffs claimed they had been bitten by rats, one was attacked by a swarm of mice. Administrative grievances and complaints to jail officials failed to resolve the problem. The detainees filed suit under § 1983 claiming that the rodent infestation violated their eighth amendment rights.

In ruling on the defendants motion to dismiss, the district court held "imprisoning plaintiffs in dungeon like conditions in which rodents crawl all over and attack them is barbarous to the standards of our contemporary society." The court ruled that rodent infestation which allows detainees or prisoners to be bitten by rats meets both the subjective and objective component needed to prove an eighth amendment violation under *Wilson v. Seiter*, 111 S.Ct. 2321 (1991). See: *Walton v. Fairman*, 836 F. Supp 511 (ND IL 1993).

BOP Liable for Recalculating Sentence

Kent Alexander is a former federal prisoner. In 1986 he was released after serving a three year federal sentence. Eighty days later he was arrested for "violation of parole" and placed in FCI Tucson. The prison administrative systems manager, Luis Rivera, told Alexander that the BOP had recalculated his previously completed sentence and extended it by 245 days claiming that the time he had spent in a German jail awaiting extradition to the US did not count against his sentence as they had previously determined.

Several times after his reincarceration Alexander requested that Rivera and William Perrill, the warden, investigate the matter. Alexander provided them with certified court documents entitling him to the jail credits and German court orders denying him release on bail due to the US extradition request. The recalculation of Alexander's sentence had been made by the Bureau of Prison's (BOP) central office in Washington D.C. Rivera and Perrill made no inquiries, conducted no investigation, did not forward the documents to the BOP central office and made no effort to determine if the BOP was aware of all the facts submitted by Alexander.

After administrative remedies proved unsuccessful, Alexander filed, and was granted, a writ of habeas corpus. He then sued Rivera and Perrill for violating his constitutional rights. The district court denied the defendants qualified immunity, which was affirmed on appeal at 916 F.2d 1392 (9th Cir. 1990). This case is the district court's granting of Alexander's motion for summary judgement on remand from the defendants' appeal. The ninth circuit had ruled that BOP "Program Statement 5880.24 does not relieve prison officials of their duty to investigate complaints by prisoners under 28 C.F.R. §542.11(a) or vest exclusive jurisdiction over the investigation of claims for foreign jail credits in the central office."

The district court, relying on *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985)(en banc), held that Rivera and Perrill were liable because "Perrill did nothing more than check with defendant Rivera for a verbal status report, Rivera did nothing more than continue to rely on the central office memorandum, essentially ignoring Alexander's protestations. As

BOP Liable (continued)

in *Haygood*, these two defendants, after being put on notice, simply refused to investigate Alexander's claims of error."

"Inmates must be able to rely on the conscientiousness of the prison officials charged with their care. Therefore, the court finds that Perrill and Rivera were deliberately indifferent to Alexander's requests for an investigation and it matters not that the defendants lacked the authority to change the sentence computation. Consequently, warden Perrill and Rivera are liable to Alexander for their failure to investigate Alexander's claim regarding the miscalculation of his jail credits."

The court also granted declaratory relief to the effect that prison officials cannot recalculate an expired sentence without prior notice and a hearing. The court set a trial date to resolve the amount of damages to be awarded. It also authorized an award of attorney fees. See: *Alexander v. Perrill*, 836 F. Supp 701 (D AZ, 1993).

MO Ad Seg Practices Unlawful

Several prisoners at the Missouri State Penitentiary (MSP) filed suit after they were held in administrative segregation (ad seg) for periods ranging between nine and thirty days without a hearing or an opportunity to challenge the information upon which the ad seg was allegedly based. The "hearing" the prisoners received consisted of the prison investigator or the segregation unit manager walking by the prisoner's cell and verbally informing them they were held in ad seg pending an investigation. The prisoners filed suit under §1983 holding that these practices violated their right to due process of law. The district court agreed and granted partial summary judgement in favor of the prisoners and denied prison officials' motion for summary judgement. The events giving rise to the suit occurred in 1988.

The court of appeals for the eighth circuit affirmed in part, reversed in part and remanded. The court noted that in 1989, after the events at issue in this suit, it held that Missouri prisoners have a right to an informal hearing within a reasonable time after being put in ad seg. Missouri statute 217.315 also creates a due process liberty interest for Missouri pris-

oners to remain out of ad seg and in the general prison population. See: *Brown v. Frey*, 889 F.2d 159 (8th Cir. 1989).

The court held that even though it had not ruled that Missouri ad seg rules created a liberty interest until after the events at issue in this suit, a reasonable prison official would have known that a liberty interest did in fact exist. The court cites numerous pre-1988 Supreme Court, eighth circuit and Missouri state cases that should have put Missouri prison officials on notice that their statutes and prison regulations created a liberty interest.

The court notes that the law was not clearly established that a fifteen day delay in ad seg prisoners receiving a hearing was unreasonable. See: *Swenson v. Trickey*, 995 F.2d 132 (8th Cir. 1993). Thus prison officials were entitled to qualified immunity on this point. However, they were not entitled to qualified immunity regarding the prisoners who were held more than fifteen days, in some cases up to 30 days, without a hearing after being placed in ad seg.

Because the investigator and unit manager were not the decision-makers as to whether the prisoners would remain in ad seg or be released, the court held that neither the prison investigator's nor the unit manager's "walk by" interviews satisfied the prisoner's right to an informal hearing. Moreover, the prisoners were not given an opportunity to present their views, thus they received no due process. The court ordered the dismissal of the claims by the prisoners held less than fifteen days without a hearing and remanded the remaining claims back to the lower court for further proceedings. See: *Jones v. Coonce*, 7 F.3d 1359 (8th Cir. 1993).

IL Prisoners Have No Right to a Valid Classification System

State prosecutors' use of extreme language and personal opinion in letters that they are required to submit to the department of corrections for use in making initial prison security classifications of newly committed prisoners does not violate the constitution or the statute itself, the Illinois Appellate Court, First District, held on November 16, 1993.

The prisoner plaintiffs sought a writ of mandamus to compel the prosecutors to submit only objectively accurate statements. Relying on cases interpreting prior versions of the statute, Illinois Corrections Code Section 5-4-1(d), the court ruled that the broad statutory language invited the prosecutors' opinions concerning prisoner's habits and characters and thus was not violated by the prosecutors references to prisoners as "savages" or their untrained opinions on particular prisoners' prospects for rehabilitation.

Nor do prisoners have a substantive due process right to a valid prison security classification system, the court also said as it affirmed the dismissal of the prisoner's related 42 U.S.C. § 1983 civil rights suit. The court did, however, suggest that although there are no due process or statutory constraints on how the state's attorneys are to compose their statements, there is nothing to be gained by exaggeration. "We remind the State's Attorney that the purpose of the statement is to give IDOC a clearer picture of the individual it is about to receive. It would seem patent that this goal is better achieved if IDOC is relieved of the burden of having to filter out hyperbole and vitriol before gaining some information of penological value about that person." The court also reminded prosecutors that their IDOC statement is not their last chance to have input in any early release decisions. See: *Dennis E. v. O'Malley*, ILL AppCt, 1st Dist. No. 1-91-2259, 11/16/93. 54 CrI 1258, 12-15-93.

Double Celling Pre-Trial Detainees Violates Due Process

Several animal rights protestors arrested while demonstrating against an annual pigeon shoot filed suit against Schuylkill County Prison in Pennsylvania, and it's officials, alleging that the conditions of confinement during their stay at the prison violated their constitutional rights. The conditions complained of in the suit include: double celling of pre-trial detainees, blanket strip and body cavity searches of all arrestees and restricted telephone access during the first 48 hours of captivity. In several cases the

plaintiffs spent up to two weeks sleeping on a mattress on the floor in a double cell or a common area. Prisoners were not allowed telephone access for the first 48 hours of confinement except for attorney, bail and family notification. All detainees were subjected to a visual body cavity and strip search under a blanket policy that made no distinctions for offenses, prior record or individual suspicion of having contraband.

The district court held that the sleeping arrangements in the prison, with all prisoners double celled or sleeping on the floors, violated their constitutional rights. Noting there is nothing unconstitutional *per se* about double celling, the court notes that forcing pretrial detainee to sleep on the floor imposes punishment which is forbidden by the constitution when inflicted upon unconvicted detainees. Because the case law regarding these rights was clearly established, the jail officials were not entitled to qualified immunity for their actions of double celling the prisoners and making them sleep on the floors. The county, however, was not liable because the jail warden and his assistant were not the highest level policy-makers in the county nor did the double-celling occur as part of an official county policy.

The court held the jail's policy of strip and body cavity searching all arrests was unconstitutional. It notes that all eight federal courts of appeal to address the issue have held likewise. Strip searching of detainees requires individualized suspicion that the individual has or may have contraband concealed on his/her person. The defendants lacked any reason to believe the plaintiffs in this case had any contraband or posed a threat to jail security having been arrested as part of an orderly mass protest against animal abuse. Because the rights involved were so clearly established the jail officials were not entitled to qualified immunity on this issue as well. Because the policy of strip searching all detainees was an official county policy the county was liable for money damages as well.

The court upheld the restriction on telephone access by holding it was minimal and once detainees were interviewed by jail counselors they were given free access to a phone within 48 hours of their initial arrest. See: *Newkirk v. Sheers*, 834 F. Supp 772 (ED PA 1993).

Washington Litigation Update

Access to the Courts: Prisoners at WCC, TRCC, MICC and WSP have filed suit concerning DOC policies, rules and practices which restrict their right of access to the courts. *Scott v. Peterson*, Case No. C92-5232B, filed in US District Court in Tacoma, is a consolidation of six individual cases initially filed by *Pro Se* prisoners. The court appointed Michael Gendler, a Seattle attorney, to represent the prisoners.

The suit contends that the Washington DOC has persisted in "continuing to dishonor all aspect's of prisoners' fundamental right of access to the courts." The complaint alleges that the law library hours at WCC, of 2.5 and 4 hours per day for day programmers is insufficient to allow for research. Prison officials there no longer allow prisoners to photocopy legal materials or to check books out of the law library. The WCC law library is not current nor kept complete. Washington DOC law libraries also have no facilities for audio or videotape viewing even though many superior court trials are now recorded on video which must be viewed by prisoners seeking to file *pro se* supplemental appeals.

The suit contends that Washington prisoners are denied the ability to make legal photocopies of their motions and exhibits without a court order. Prisoners in closed units such as IMU do not have law library access and are denied their right of access to the courts. Because the Washington DOC does not provide for all hygienic supplies, prisoners must choose between meeting their basic needs and buying the materials needed to exercise their right of access to the courts, i.e. pen, paper, envelopes, etc.

Prisoner law clerks receive no training and lack the skills and education to provide legal assistance. Prisoner law clerks are also prohibited from assisting prisoners in legal matters. The cost of photocopies, at 20¢ per page, far exceeds the cost of copies and chills plaintiff's exercise of their right to access the courts.

Prisoners who sue over prison conditions are routinely transferred in retaliation for exercising that right and some are physically threatened as well.

At TRCC officials deny prisoners the right to make unmonitored calls to legal counsel. They have also imposed improper limits on legal materials in retaliation and harassment of prisoners who file suit. The TRCC law library is also inadequate.

At McNeil Island annex the prison lacks a law librarian or other trained person, does not keep prison policies there and takes up to two weeks to obtain requested citations from the main prison law library three miles away. MICC officials also refuse to copy prisoners' pleadings absent a court order. They also debit prisoners' accounts for legal mail even though the prisoners are indigent. Prisoners in segregation at MICC are denied law library access and the assistance of persons trained in law. Prisoners are also denied access to their own legal materials and their legal mail is opened, delayed and refused.

At the Washington State Penitentiary at Walla Walla, prisoners in the MSU complex are denied access to an adequate law library. In order to use a law library they must undergo cumbersome and time consuming security measures which result in their being unable to use chairs or typewriters. Prisoners are denied the assistance of persons trained in the law and the law library lacks basic legal forms. Timely photocopying is also not provided to WSP prisoners. Indigent prisoners are forced to choose between buying essential hygiene supplies or legal supplies such as postage, copying, etc., to exercise their right of access to the courts. WSP prisoners are retaliated against for their litigation resulting in less favorable security classifications and housing.

The complaint notes that legal mail between the plaintiffs and their attorney has been opened, returned as undeliverable and otherwise been interfered with. Plaintiffs are routinely retaliated against and transferred for exercising their right of access to the courts and their legal materials then are "lost" or destroyed.

DOC policies are inconsistent, contradictory and insufficient to ensure adequate access to the courts. In particular, the DOC prohibits jailhouse lawyers from assisting other prisoners through the mails.

Health Care at Purdy: *Hallett v. Payne*, Case no. C93-5496TD is a class action suit filed on behalf of female prisoners at Purdy by Evergreen Legal Services. The suit contends that the DOC has failed to provide Purdy prisoners with adequate health care, to include medical, dental and mental health care. The suit contends women prisoners are not provided with the same or comparable health care as their male counterparts;

WA Update (continued)

that the health care system at Purdy is disorganized and it's staff inadequately trained and supervised; there are inadequate staff to provide needed health services; routine gynecological and dental care is not provided; non-physician staff override the professional judgement and medical orders of physicians in determining if prisoners receive off site care; medications are improperly dispensed; follow up care is often not provided; infirm conditions are unclean and unsanitary; medical records are poorly kept and prison officials know of these problems yet have done nothing to correct them.

The five specific plaintiff's named in the complaint have suffered direct injury as a result of these conditions including not being seen by necessary specialists, being denied medical care, tests, etc. The suit also claims that the use of top bunks is a dangerous threat to prisoners who have fallen from them while having seizures and injured themselves.

The case has withstood a motion to dismiss by the state. Magistrate Wilson has recommended dismissal of the claim regarding the double bunks. The plaintiffs have objected.

Translation and Provision of Interpreters: This suit, *Lopez v. Riveland*, was originally filed by PLN editors Paul Wright and Ed Mead on behalf of Non-English Speaking Prisoners (NESP's) at WSR. In January, 1990 the Division of Prisons promulgated Policy 430.050 which mandated that DOP facilities issue all rules and policies in Spanish at the same time they were issued in English. To date, this has never been done. Administrative complaints were ignored.

The suit alleged that the denial of rules and policies to non-English speaking Hispanic prisoners violated their right of to due process and showed deliberate indifference to their safety. Attorneys at Evergreen Legal Services have taken on representation of the suit and have expanded it into a state wide class action suit to encompass all non-English speaking Hispanic prisoners, about 20% of the total DOC population.

The suit contends that the DOC does not provide NESP's with consistent translation in disciplinary, classification and ad seg hearings. There is no translation services for medical care which

threatens their health. NESP's receive no formal orientation to prison life nor access to prison rules. There are no legal materials available in Spanish nor provision for translation of legal documents into Spanish. There is no material on emergency safety measures in Spanish. DOC libraries lack adequate general reading materials for Spanish speaking prisoners.

Given the large number of NESP's being imprisoned due to the "war on drugs", litigation requiring prison officials to provide materials in their native language is long overdue. There is no case law on this subject so the suit is a trend-setter in this regard. The suit is currently in the midst of settlement negotiations with the DOC.

Court Cannot Dismiss Suit When Partial Filing Fee Paid

Robert Butler is a Nevada state prisoner. He filed suit under § 1983 alleging his defense attorney and trial judge at his state court trial had conspired together in order to deny him a fair trial.

The district court granted Butler permission to proceed *in forma pauperis* but required him to pay a partial filing fee. The district court then dismissed the action, before service of process on the defendants, as being legally frivolous under 28 U.S.C. § 1915(d). The court of appeals for the ninth circuit reversed and remanded.

The appeals court held that once a plaintiff has paid a portion of the filing fee a district court cannot dismiss an action as frivolous before service of process. Every court to consider this issue, the 6th, 7th and 8th circuits, have ruled likewise on this issue.

The court expressed no opinion on the merits of Butler's claim but noted that the claim against the judge will have to be dismissed at some point because judges have absolute immunity in lawsuits for money damages. However, the entire action should not have been dismissed with prejudice before service of process. See: *Butler v. Leen*, 4 F.3d 772 (9th Cir. 1993).



LA Prisoners Boycott Phones

By Paul Wright

In June of 1993 Global Tel-Link won a 3 year contract with the Louisiana Department of Public Safety and Corrections to install about 875 phones and handle all collect calls placed from the state's 16 adult and juvenile facilities. The company, which mentioned the "profitability of prisons" in its bid document, agreed to pay the state at least \$5 million annually in commissions. Global's revenues come from the persons who accept the collect calls placed by the prisoners.

Since taking over the phone services Global has massively increased the rate it charges for the calls. For example, a 15 minute call from the prison at Angola to New Orleans increased from \$3.60 to \$6.90. This increase led to a mass number of complaints being filed by prisoners, their families, advocates and attorneys with prison officials and the Louisiana Public Service Commission (PSC). They also complained that the quality of service has declined with callers unable to hear each other.

Noting that, in violation of it's contract, Global was charging higher rates than other local carriers such as ATT, Corrections Undersecretary James LeBlanc ordered Global to reduce it's rates and reimburse customers who had been overcharged since June 8, 1993. The Louisiana Public Service Commission ordered business' providing prisoner telephone service to provide the same discounts for evening, night, weekend and holiday calls offered by South Central Bell, ATT, MCI and Sprint. That order will lower Global's rates.

To protest the massive rip-off being carried out by Global, prisoners at the state penitentiary in Angola are boycotting the phone. The normal usage rate at Angola is about 2,000 calls per day, that was down to about 600 per day as a result of the boycott which began on October 4, 1993. LeBlanc said prison officials were trying to resolve the matter in the prisoners' favor and said "We're all in this together, including the Governor's office. I'm comfortable with our position, but I don't know where it's headed. If nothing else, the inmates will bring them (Global) to their knees."

The boycott was organized at the main penitentiary in Angola. Its organizers urge prisoners to use the phone if they have an emergency and are not encouraging prisoners in segregation to give up their limited phone privileges. Lifers President Checo Yancy said of Global, "They can't use us as a commodity. These guys are buying stamps 50 and 60 at a time. They're ready to go as long as it takes." Another prisoner said "If they don't want to pay the state its commissions, they can just come and take their phones."

Global's lawyer is Edmund Reggie, a former Louisiana state judge who is himself a convicted felon who pled no contest to misapplying funds from a failed savings and loan where he was board chairman. In defending Global's exorbitant phone rates Reggie said: "And the PSC order is dealing with phone rates of felons whom the state is already spending exorbitant sums per day to house, feed and care for them." Noting the ink was not yet dry on Reggie's own conviction, prisoners Henderson and Yancy point out that the excessive phone charges are victimizing prisoners' families and loved ones, who have not been convicted of anything. The PSC has reaffirmed its order requiring Global to conform its rates with those of other local carriers. PSC Commissioner Don Owen noted that the PSC is not in the business of allowing high rates so that state government can make more money.

Louisiana Governor Edwin Edwards has stated he would not approve a change in the contract with Global which would permit them to charge more than local carriers. He stated the agreed upon rate was what prisoners' families, friends and relatives were being charged at the time the contract was signed. "Our concern is with the inmates' families who are being asked to pay more. We need to give fair weight to their rights in this matter."

Apparently Global has agreed to reduce its rates and provide refunds for the overcharges to the affected customers. The issue of excessive phone charges is one that affects prisoners across the country and needs to be challenged in each state. *PLN* will continue to report on this important issue. We urge readers to keep us posted on local developments in this struggle.

Prisoners Pursue Prison Industries Litigation Despite Continued Retaliation

By Ken Krause

Several prisoners at the Ely State Prison in Ely, Nevada are continuing to litigate despite repeated retaliation by Ely State Prison officials. Kenneth Krause, Edward Wills and David Bean began a federal RICO suit in 1991 alleging that the prison drapery factory was not paying minimum wage in violation of their employment contracts and federal law.

The original action was dismissed in the Nevada federal district court. A follow up Qui Tam action based upon the same facts was effectively "frozen" in the U.S. District court for the Central District of California, supposedly because the three had not provided the U.S. government with a copy of the exhibits. The court then sealed the file.

The latest action alleges that prison officials submitted false reports to the federal government claiming that they were paying the prisoners the minimum wage, but Krause, Wills and Bean conducted their own investigation and found that the prisoners were not being paid anywhere near the minimum wage at the time the certification reports were made.

Apparently during the litigation of these cases the three of them must have touched a nerve somewhere because in September of 1991 they were written up for filing "harassment" lawsuits. The three had written to the shop's customers inquiring into the wage rate that the shop was claiming they were paying the prisoners at the ESP drapery factory. They also wrote to the U.S. Justice Department asking for copies of the shop's certification documents. These inquiries were the basis of the prison write-ups and charges. The charges were that they were illegally using the U.S. Mails for investigation work; that they illegally contacted prison employees or independent contractors; and that they used the prison telephone illegally. The prison charges were eventually dismissed, however, the three go to trial late in either '93 or '94 on their allegations that the write-ups were retaliatory.

The retaliation did not stop there. In September of 1992 the three were again the focus of prison officials' wrath when they were placed in administrative segregation. Prison officials claimed that it was for their own protection, but lower echelon prison officials admitted that the order to lock the three up came from the Director of the NDOP and assistant director for Prison Industries. They were not amused by the three prisoners' activities. Their stay in lock up ended only when a new warden came to ESP. The second round of retaliation is the subject of a second retaliation suit by Krause, Wills and Bean.

Prisoners have a constitutional right to use the mails and file legal actions and should be encouraged when uncovering such criminal activity by prison officials as was done in this case. Any prisoner who would like to inquire into how to conduct a civil investigation should contact either Kenneth Krause or Edward Wills at the Ely State Prison, P.O. Box 1989, Ely, NV 89301-1989. *[Editors Note: Nevada does not permit its prisoners to correspond directly with other captives.]*

Report on Indiana Control Unit Issued

The Coalition Against Indiana Control Units (CAICU) has issued its report *Human Rights Violations and Torture on the Rise at the Maximum Control Complex at Westville, IN: Profile of a Supermax*. The report details and documents the conditions of confinement suffered by prisoners at the MCC in Westville. This is must reading for those involved in the struggle against control unit proliferation. It paints a grim and horrifying picture of prisoners shut in stark white steel cells for 165 out of 168 hours a week, not permitted visits their first 90 days in MCC after which they could receive one visit a month; mail is censored, daily newspapers have to be turned in within 24 hours to be destroyed, no library is available, cell temperatures average between 40 and 50 degrees F with no hot water for showers and prisoner's thermal underwear being "lost"

by officials. Since it's opening MCC prisoners have suffered ailments such as digestive problems, rashes and skin problems.

The prisoners, most of whom are black and politically active, have constantly struggled against these conditions. This includes hunger strikes, litigation and such. Amnesty International has written letters of inquiry to the Indiana DOC concerning these conditions which have been ignored.

Prisoners continue to be beaten, sprayed with chemical agents, fire hosed, strapped to their beds for hours at a time and are otherwise physically and psychologically abused. The report contains numerous instances of abuse against individual prisoners citing dates, times and details of the incidents.

There is currently a community effort to help the prisoners against these ongoing atrocities. For a copy of the report, further information and how you can help contact: CAICU, P.O. Box 14075, Chicago, IL. 60614-0075. Or call Rev. Michael Yasutake at 708-328-1543.

Informant Sues Over Disclosure

Steve Rutledge is an informant in the Illinois state prison system. While housed at the Joliet prison he informed on members of the North Side gang who were planning an escape attempt. As a result, the would-be escapees were segregated, infractioned and punished. Prison officials promised Rutledge fabricated infractions to make it appear as if he too had been punished.

According to Rutledge, it was prison officials who had revealed his informant activities to other prisoners. As a result he was twice scolded, threatened, attacked and placed in protective custody.

The district court noted that the defendants did not deny revealing Rutledge's status as an informant to other prisoners. Because prison officials are responsible for prisoners safety, even that of their informants, such an allegation would violate the eighth amendment's ban on deliberate indifference to prisoners' safety. Whether such was actually the case would be determined by a jury at trial. See: *Rutledge v. Springborn*, 836 F. Supp 531 (ND IL 1993).

From the Editor

By Paul Wright

Welcome to another issue of *PLN*. First, please accept my apologies for the late arrival of the March issue. In the past we have mailed *PLN* from Seattle on the last Tuesday of the month. We have now switched our printing and mailing operation to the New York City area and there was some delay in straightening out the necessary postal permits. We are now back on schedule and should remain this way for the foreseeable future.

Readers may have noticed that our last issue did not have an editorial by Ed. The parole board's ban on communication between Ed and myself has proved unworkable. For the foreseeable future, Ed has discontinued his involvement with *PLN*. The ACLU of Washington has agreed to file suit challenging the parole board's action. This will be the subject of an article in an upcoming issue of *PLN*. In practical terms nothing will change as far as *PLN* goes, we will continue to appear monthly and strive to be a progressive voice for prisoners and their supporters as well as an outstanding source of legal and political information.

The March issue was printed on bond paper because the new printer did not have any newsprint in stock. We are keeping the current format for the foreseeable future as everyone who has written agrees that this is the easiest to read and most visually attractive.

We are still seeking to build up our subscriber base. With this issue we will begin sending sample copies to legal aid and public defender offices around the country. Because we don't have money for an advertising budget we rely on the occasional direct mailing and word of mouth advertising from our readers. Please continue to let others know about *PLN* and encourage them to subscribe. Ads or blurbs in prison and community newspapers are a good way to reach our target audiences. We can send sample copies to potential subscribers and can also make arrangements to send bulk issues of *PLN* for you to distribute in your prison (assuming your captors allow it), community, law office, at events, etc.

Please check your mailing label and make sure it is correct. You need to notify us promptly of any address changes as the post office does not forward *PLN* and charges us to return each issue. We have also received complaints from readers at state prisons in Lucasville and Lebanon, Ohio, Walla Walla, WA. and FCI Jesup that they have not received *PLN*. None have been returned to us nor have we received any rejection notices. As a matter of policy we appeal all attempts at censorship and are willing to provide affidavits and other support in the event *PLN* is not delivered or is withheld. Readers need to let us know if you are having problems receiving *PLN*. So far we have been able to resolve most problems administratively. Enjoy this issue of *PLN* and pass it along to others.

Stop the Ohio Super-Max!

Ohio presently imprisons some 41,000 prisoners in 23 different penitentiaries designed to hold 21,738. It plans to build six more prisons, including a super-maximum, or Super Max, prison which will confine only 500 prisoners and cost taxpayers \$15 million to build. Super max prisons, such as the U.S. Penitentiary at Marion, IL, or the Pelican Bay State Prison in Crescent City, CA, or even the Super Max Unit at the Southern Ohio Correctional Facility in Lucasville, OH, increase and concentrate the violence. Long term isolation increases prisoners' psychosis and anger levels so that they react violently when released.

Super max prisons are supposed to imprison the "worst of the worst". Yet according to the Prison Discipline Study, a report done by the Prisoner's Rights Union in California, the groups of prisoners most frequently abused by solitary confinement are jailhouse lawyers, union organizers, activists, those verbally expressing their opinions and even those reporting conditions of confinement to people outside prison.

Super max prisons give guards and administrative staff a green light in conducting and/or condoning the use of violence against prisoners. This includes "cell extractions" where prisoners are attacked with chemical agents, beaten and restrained for trivial reasons or no reason at all, long term sensory deprivation, etc. This increases the number

Stop OH Supermax (Continued)

of lawsuits filed in which taxpayer's money is used to defend the perpetrators of these acts, most of whom are guilty.

Deterrence is not a concern of prison officials who operate super max prisons. As shown by the deaths of two guards in the control unit at Marion, IL. or the hostage takings in the Super Max unit at Lucasville. Rather, super max prisons are destructive without a constructive element. It is not only a prison based on psychological conditioning but also a prison designed to decrease the mental stability of it's victims, thus making them more unpredictable and less controllable, a price which will be paid for by society when these prisoners are eventually released.

Ohio Targets Activists As "Gang Members"

By John Perotti

The Department of Rehabilitation and Corrections (DORC) instituted a regulation prohibiting "gang related activity." This was implemented to fall in line with their overall intention to follow in the footsteps of California, Texas, Illinois and other states which have built "Super Max" prisons and focused on alleged "gangs" and "gang leaders" in prison. Ohio has gone so far as to manufacture gang members.

The DORC's latest tactic has been to target political activists and jailhouse lawyers for "gang related" charges when prisoners engage in lobbying the legislature. Danny Cahill, a political and prison activist working toward prison reform by lawful means such as lobbying the state legislature was charged with the infraction of "gang related activity" for advocating an Ohio Prisoner's Rights Union and receiving ACA (American Corrections Association) material from CURE (Citizens United for the Rehabilitation of Errants). Cahill was placed in Local Control, six months of solitary confinement, for this at the Madison Correctional Facility. He began a hungerstrike in protest and after 38 days was transferred to Lebanon Correctional Institution.

We have drafted a citizens lobby letter protesting the implementation of a Supermax prison in Ohio along with a fact

To put a stop to the construction of a super max prison in Ohio, and to suggest that taxpayers money be allotted to rehabilitative programs instead, write the chairman of the Ohio general Assembly and any or all of the below.

Ohio General Assembly
C/O The Chairman
State Office Tower
Columbus, OH. 43215

Reginald Wilkinson, Director
Ohio Dept. of Rehab. & Corr.
1050 Freeway Dr. North
Columbus, OH. 43229

Paul Mifsud
Governor's Chief of Staff
State Office Tower, Columbus, OH. 43215

sheet. Copies of these were made and sent, along with ABC proposals, to Danny at Lebanon. These items were confiscated and Danny was again infraacted for "gang related activities" and placed in segregation. Danny again began a hunger strike and as of February 11, 1994, had fourteen days on it. He will refuse to eat until he is released from segregation.

The blatant political repression by use of a "gang related activity" rule infraction must be stopped. Litigation is pending but we call on all activists, inside and out, to take the time to write a protest letter regarding the distorted use of this rule and Danny Cahill's treatment. By the time this is printed he will be almost two months into his strike.

Protest letters should be sent to:

Governor George Voinavitch
Vern Riffe Center
77 South High St.
Columbus, OH. 43215

Reginald Wilkenson
Director, DORC
1050 Freeway Drive N.
Columbus, OH. 43229

[Editors Note: Danny Cahill is a PLN subscriber. His issues of PLN have been confiscated with no notice or reason provided to either him or PLN for the confiscation. It is obvious that he is being repressed for seeking peaceful change within the Ohio prison system. We have written to protest the censorship of PLN.]

GA Parole Rules Create Liberty Interest

Stephen Sultenfuss is a Georgia state prisoner serving sentences for two drug convictions. Under the rules of the Georgia Board of Pardons and Parole (GBPP) he should have served 10 months in prison. Disregarding their own rules the GBPP imposed a period of 62 months of incarceration before parole.

Sultenfuss filed suit under § 1983 with several other Georgia prisoners alleging that the GBPP's actions, not following their own rules, violated the plaintiff's rights to due process and equal protection of the law. The district court dismissed the suit as being frivolous under 28 U.S.C. § 1915(d). The court of appeals for the eleventh circuit reversed and remanded.

The appeals court gave an extensive discussion of state created liberty interests and cites extensive case law where state parole rules have been found to create a due process liberty interest. This is in the context that prisoners have no fundamental right to parole and parole boards have wide discretion, unless channelled by statute, to grant or deny parole.

The court gave an extensive explanation of the Georgia parole system and the rules used to calculate a prisoner's actual term of confinement. Based upon this analysis the court concluded that Georgia has created a liberty interest in it's prisoners being paroled. The board lacks the discretion to "disagree" with parole determinations resulting from it's Parole Decisions Guidelines System. The court was not persuaded by the defendants' claim that they had determined the parole rules did not create a liberty interest in parole. "It is for the federal courts to determine whether the Georgia Parole scheme, as embodied in the Georgia constitution and applicable statutes, rules and guidelines, creates a liberty interest in parole release protected by the due process clause of the Fourteenth Amendment." Readers will note that this is a 42 U.S.C. § 1983 suit seeking injunctive and declaratory relief against parole board officials, it was not a habeas action. See: *Sultenfuss v. Snow*, 7 F.3d 1543 (11th Cir. 1993).

Work Release Revocation Requires Hearing

Billy Jackson was an Arkansas state prisoner. She was placed in work release but later quit her job and her parole officer could not locate her at her address of record. She was later arrested on charges of public drunkenness, returned to prison and given a prison disciplinary hearing whereupon she was found guilty of the above charges and her work release and minimum custody status were revoked.

Jackson filed suit claiming that she was entitled to the process due a parolee at a parole revocation hearing: written notice of the alleged violations; disclosure of the evidence against her; an opportunity to be heard, present witnesses and evidence on her behalf; the right to confront witnesses; a neutral and detached hearing panel and a written statement by the finders of fact. See: *Morrissey v. Brewer*, 408 US 471, 92 S.Ct. 2593 (1972). Prison officials maintained she was entitled to only a prison disciplinary hearing with the most rudimentary elements of due process under *Wolff v. McDonnell*, 418 US 539, 94 S.Ct. 2963 (1974). The district court denied the defendants' motion for summary judgement and they appealed claiming they were entitled to qualified immunity.

The court of appeals for the eighth circuit reversed and remanded. The appeals court notes that in *Edwards v. Lockhart*, 908 F.2d 299 (8th Cir. 1990) it had held that while revocation of work release required a parole revocation type hearing under *Morrissey*, this was not clearly established in 1988 when the events giving rise to this suit took place. Thus prison officials were entitled to qualified immunity because they could not have reasonably foreseen that their actions violated clearly established law. See: *Jackson v. Lockhart*, 7 F.3d 1391 (8th Cir. 1993).

No Right to Gate Money

Several New York state prisoners filed suit under § 1983 over a plan enacted by the New York state legislature which revoked the \$40 gate money previously given to prisoners upon their release by the state. They also challenged a plan under which prison officials would seize 12.5% of all money earned or received by a New York prisoner in the last year of his/her confinement until \$40 had been saved, this would then be used as gate money and given to the prisoner upon their release. The district court ruled against the plaintiffs and dismissed the suit.

The court begins by noting there is no constitutional right to receive gate money upon release from prison. In this case the New York state legislature had specifically repealed the statute which authorized gate money. The legislature's actions in this case are constitutional and violate no federal right.

Likewise, the court upheld the practice of withholding 12.5% of prisoner's income until such time as the \$40 limit was reached. The court ruled the injury was *de minimis* for legal purposes and narrowly tailored to achieve a specific penological goal authorized by the legislature. See: *Webster v. Chevalier*, 834 F. Supp 628 (WD NY 1993).

Jail Sued Under ADA

In 1990 Congress passed the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131-12134, which prohibits discrimination against the disabled by public services. Readers will note that this law applies to prisons and jails who can be sued for failing to provide disabled prisoners with reasonable accommodation to the benefits of services, programs or activities available to other prisoners. As a new and developing area of prison law *PLN* will report developments as they occur.

Larry Noland is a semi-quadruplegic who cannot use his legs, one arm and has no bladder. He requires several daily medications as well as care to prevent body sores. While in the Wabash County, Indiana, jail he was placed in a padded cell with no bed, furniture or running water, poor ventilation and temperature control with only an open drain for the disposal of bodily waste. Constantly viewed by surveillance cameras, Noland had no privacy even while attempting to bathe. Due to his medical condition he requires large amounts of water to ensure his kidneys function, yet even after jail

doctors prescribed 64 ounces of water per shift Noland was given less than eight ounces of water a day. The sheriff and jail guards were aware of Noland's plight but did nothing to alleviate it.

After three months Noland was allowed to shower but had to do so by sitting on a dirty shower floor despite having open, infected sores. He also had to dress and undress on the floor. Noland was often denied his medications, and the sheriff refused to hire a licensed nurse to care for him. Noland uses a colostomy bag and would often get feces on his hands when emptying the bag. He often had to wait as long as 24 hours in order to wash his hands and as a result had to eat many of his meals with feces on his hands. There were other abuses as well, such as denial of recreation, law library access, etc., but the reader gets the picture that Noland's conditions of confinement were less than pleasant.

The district court begins its opinion by dismissing Noland's claims under 29 U.S.C. § 794(a), the Rehabilitation Act of 1973. To state a claim under this law a plaintiff must allege: "(1) the plaintiff is a 'handicapped person' under the Act; (2) the plaintiff is 'otherwise qualified' for participation in the program; (3) the plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his handicap; and (4) the relevant program activity is receiving federal financial assistance." In this case Noland failed to allege that the relevant program (i.e. the jail) received federal financial assistance. The court provided him with fifteen days in which to amend his complaint and rectify this.

In analyzing the ADA claims the court held that a "right to sue" letter is not required for ADA plaintiffs. Nor must ADA plaintiffs first file an administrative claim with the Equal Employment Opportunity Commission before filing suit. Thus, the ADA imposes no requirement that plaintiffs first exhaust administrative remedies before they file suit.

The court held that 42 U.S.C. § 1983 is a proper remedy to enforce the ADA where a violation occurs under color of state law. Because the ADA provides claimants with a private right of action and the right to proceed with a civil suit at any time, section 1983 provides the means to do so. This is in addition to administrative remedies available through the Justice Department.

The court ruled that Indiana Administrative Code (IAC) rules concerning jail standards do not create a due process liberty interest in their enforcement.

The court held the defendants were not entitled to qualified immunity for their acts because the ADA is "clearly established" law on its own weight. Readers will note that Noland's attorney filed this suit solely on statutory grounds, the Rehabilitation Act and ADA. No constitutional claims were raised or made. This case dealt with a ruling on the defendant's motion to dismiss. It was not a ruling on the merits. See: *Noland v. Wheatley*, 835 F. Supp 476 (ND IN 1993).

BOP Suits Require Administrative Exhaustion

John Rourke is a federal prisoner. He filed suit seeking injunctive relief alleging that prison officials had denied him medical care and arbitrarily imposed disciplinary sanctions against him. The district court dismissed the suit without prejudice as frivolous, before service on the defendants, holding that Rourke was required to exhaust his administrative remedies with the BOP, i.e. the BOP grievance procedure set forth in 28 C.F.R. § 542.

The court of appeals for the fifth circuit affirmed. In this case Rourke had filed suit under 28 U.S.C. § 2241, the habeas corpus statute, which does not allow money damages, only injunctive relief. While federal prisoners need not exhaust their administrative remedies when they seek only money damages under *Bivens* suits, they must when seeking injunctive relief. See: *McCarthy v. Madigan*, 112 S.Ct. 1081 (1992).

Because Rourke had not exhausted his administrative remedies his suit was "frivolous" because the court would have been required to dismiss it later on this issue. The appellate court notes that the dismissal was without prejudice which allows Rourke to refile his suit if the administrative appeals are resolved against him, thus his access to the courts is not foreclosed. The court noted that this claim did not involve a mixed claim for both injunctive and monetary relief and expressed no opinion on the proper result in such a case. See: *Rourke v. Thompson*, 11 F.3d 47 (5th Cir. 1993).

Mexican Prisoners Speak Out

[PLN is committed to keeping its readers informed of those who are in prison as a result of the struggle for social and economic justice. By now everyone has heard about the rebellion which rocked Mexico when, on January 1, 1994, guerrillas of the Zapatista National Liberation Army took and held several towns and cities in the state of Chiapas in Mexico. We recently received the declaration below from Mexican political prisoners. We have edited it for the sake of brevity. Anyone interested in a copy of the complete document please send a SASE to the editor. The translation was made by PLN editor Paul Wright.]

After Three Years of a New Period of Political Prison!

To the Revolutionary and Democratic Organizations and Parties of Mexico and the World:

In our country an armed revolutionary movement with deep historical roots exists. It originates in the prevalent economic, social and political conditions. In this context, the Partido Revolucionario Obrero Clandestino del Pueblo (PROCUP or Clandestine Revolutionary Workers Party of the People) proposes the radical transformation of society by means of a strategy of Prolonged People's War which contemplates the armed struggle as the fundamental path of the revolution. And through it the development of all forms of struggle contribute to the obtaining of the historic objectives of the people and proletariat of Mexico: the seizure of political power, the installation of the dictatorship of the proletariat and the building of socialism according to national peculiarities.

The Political Constitution of the United States of Mexico, promulgated on February 5, 1917, did not give the solution to the fundamental demands for which the armies led by Francisco Villa and Emiliano Zapata fought. Misery, repression and exploitation continued being daily elements of life for the exploited sectors of the country. The conditions which legitimize the existence of the current revolutionary movement are *[Ed. Note: among others]*:

The North American Free Trade Agreement (NAFTA) is the most complete legal form which legitimizes and facilitates the control of the country's economic life by the biggest American monopolies. The enormous technological dependence is another manner in which imperialist hegemony manifests itself. Mexico is developed as a maquilador country, or an instrument for the big multinationals to gain access to the markets of Latin America.

In the political aspect, it is evident that the constitutional order in our country is broken and that the economic, political and social rights enshrined in the Constitution of 1917 do not exist for the majority of Mexicans. The right of the people to change their form of government by electoral means is violated by the machinery of institutionalized fraud. The right to life, liberty, association, organization, press and to strike, all of which constitute political liberty, are constantly violated by the repression exercised by the state.

From 1988 to date, 230 militants of the Partido de la Revolucion Democratica (PRD) (Party of the Democratic Revolution) were murdered as a result of their opposition attitude and this while developing peaceful forms of struggle. The disappearance of more than 810 detainees continues unchecked without knowing their whereabouts; more than 80 teachers in the state of Oaxaca have been murdered in the recent years; 50 Triqui Indian leaders have been murdered since 1980 in the state of Oaxaca; the state of Guerrero finds itself in first place in the classes of political repression with 50 dead and 90 disappeared in the last five years. In 1992 alone the national press reported: 72 murdered for political reasons; entry into prisons of more than 1,699 prisoners for political reasons; 1,201 arrest orders issued against opposition figures and 865 wounded during repressive actions against demonstrations of citizen's discontent. Currently Mexico is in first place in the murder of journalists in Latin America with 85 victims, 32 of them in the last six years.

The below signed political prisoners are only an expression of the existence of the armed revolutionary movement and we strive to transform the adverse military blows that our capture signifies into small but significant political victories. We maintain our

Mexican Prisoners (Continued)

party identities and the points of view which characterized us before entering prison. The collapse of the socialist countries, attributable to the criminal imperialist pursuit and to the leadership errors of their vanguards, do not refute, as bourgeois ideologists attempt to do, the validity of the scientific principles contained in Marxism-Leninism and consequently of humanity's ideal to build a society where justice and equality prevail as fundamental values.

In the time we have been imprisoned we have confronted the non-existence of a true state of law, a situation which has reflected itself within the procurement, administration and dispensing of justice. Without exception we were detained by various police entities without any type of arrest orders. In the same manner we were subjected to cruel torments in clandestine prisons and within installations of the Attorney General's office of Mexico City. This illegal treatment included comrades Ana Maria Vera Smith and Blanca Lino Muro Gamboa, who were also threatened with having their children killed or tortured in front of them.

To demonstrate the application of torture we can rely on various certificates of lesions signed by forensic doctors assigned to the ministry of justice as well as affidavits issued by doctors who are members of non governmental human rights organizations.

Faced with the inadequacy, inefficiency and decorative character of the National Human Rights Commission, we have denounced the use of torture against detainees as a form of institutionalized practice by the Mexican state and our cases have been taken by organizations such as the International Federation for the Rights of Man and the Special Investigator Against Torture of the United Nations Human Rights Commission. Said groups have requested that the Mexican government act with strict adherence to the law in investigating official responsibility in the application and use of torture.

The judicial and political processes which are carried out against us are plagued by irregularities, such as the fact that over three years have gone by in one case, and two years in another, without a sentence being imposed, violating the time limits established by the current laws. In a third case an aberrant sentence has been imposed, without a legal basis and against the statutes in effect. Nevertheless, we should say that we are more concerned about the general problems of the nation rather than our own specific circumstances and that we are dedicated to make the prisons into another scenario for the expression of our political convictions.

The advance of the revolutionary movement on the national level represents a solid backing for the popular struggles, as well as a check on the impunity of the governmental forces and an element of reflection for those functionaries who order repression. Forward! The future is one of equality for the peoples of Mexico, America and the World.

Collective of political prisoners, militants of PROCUP and the PDLP.

British Govt Rolls Back Civil Rights

As part of the political and economic crisis racking all the capitalist countries the British government has recently passed it's version of a crime bill. Home Secretary Michael Howard says the bill is the most comprehensive attack on "crime" in three decades. This follows over a decade of war by the ruling class on the British poor and working class.

The core of the new bill will allow children as young as ten to be imprisoned for a variety of crimes such as robbery, rape, manslaughter and murder.

One of the other main proposals will drop a suspects right to remain silent. Currently, a suspect is told by police that he has the right to remain silent but that anything he says may be used as evidence against him. Under the proposed change a suspect will be told that failure to reveal relevant information to the police may damage his case.

Some civil libertarians have condemned this crime bill. However, it is hardly new. For years now suspects accused of political offenses have had no right to silence. While being tried in front of special one judge courts the judge is entitled to weigh a suspects' silence against them. This is another case where the draconian measures used to crush political dissent are later used against the populace at large.

Brazilian Guard Gets 516 Years

On October 23, 1993, Celso Jose De Cruz, a military police investigator, was sentenced by a Brazilian judge to a record 516 years in prison for the murder of 18 prisoners. A jury had found Cruz, 46, guilty of all 18 counts of murder.

The jury found that in February, 1988, after an escape attempt, Cruz had locked up 50 jail prisoners in a cell that measured one and a half meters by three meters. The only ventilation opening in the cell was closed. When other guards opened the cell 2 hours later, nine prisoners were already dead of suffocation and another nine died en route to the hospital.

This was the first time in Brazilian history that a jail or police official has been convicted of killing a prisoner. The prosecutor said: "This conviction is important because it sets a precedent against the impunity enjoyed by the police in this country." Brazilian police have carried out at least three mass killings of prisoners since October of 1992.

Legal News in Brief

NCIC Info Rule: The Bureau of Prisons, Department of Justice, has issued a final rule amending it's rule on production or disclosure of FBI/National Crime Information Center (NCIC) information to conform to NCIC's requirement that any request by a prisoner for his or her NCIC Interstate Identification Index be made directly to the FBI. 58 FR 68765 (No. 248).

9th Cir. Amends *LeMaire* opinion: The Court of Appeals for the ninth circuit recently amended an opinion concerning the constitutionality of conditions in the Oregon State Penitentiary's (OSP) Disciplinary Segregation Unit (DSU). *PLN* reported the decision in Vol. 5, No. 1 (January, 1994). The court adhered to it's decision in *LeMaire v. Maas*, 2 F.3d 851 (9th Cir. 1993), which was to set aside, by a 2-1 vote, several parts of an injunction issued by the lower court. What is new in the opinion amended on December 23, 1993, is an addition to the majority's explanation for holding that the eighth amendment standard applicable to the

prison officials' conduct in this case is the one that defines "wantonly" as "maliciously and sadistically for the very purpose of causing harm." The U.S. Supreme Court applied that standard in *Hudson v. McMillian*, 112 S.Ct. 995 (1992), the majority pointed out, even though no riot or major disturbance was involved. The majority also cited cases from other federal courts of appeals, e.g., *Jasper v. Thalacker*, 999 F.2d 358 (8th Cir. 1993), in which the heightened standard was employed in situations involving prison officials' responses to violent or unruly behavior by individual prisoners. See *Lemaire vs. Maas*, amended at: 12 F3d 1444 (9th Cir. 1993).

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Giving Cons and Ex-Cons the Vote

By Andrew Shapiro

During Congress's annual open season on criminals, few lawmakers are eager to defend the rights of the accused, let alone the convicted. So it was particularly refreshing this year to see a proposal in an alternative crime bill submitted by Representative Craig Washington that would have guaranteed the right to vote in federal elections to ex-convicts and to convicts serving nonprison sentences.

Washington's measure didn't stand a chance of becoming law in this frenzied tough-on-crime climate. But it should prompt civil rights advocates to revisit one of our nation's most persistent yet little known injustices: the exclusion

from the electorate of millions of citizens because of their status as former or current criminal offenders.

Only three states, Maine, Massachusetts and Vermont, allow inmates to vote. And in many places, a convict released from prison doesn't gain his most basic political right: thirty-five states deny suffrage to non-incarcerated offenders, such as those on probation or parole; fourteen states disenfranchise offenders for life unless they are pardoned (which is rare). As a result, the right to vote is denied to at least 4 million Americans, a disproportionately large share of whom are black and Latino.

The tradition on banishing criminals from the body politic is an old one, passed down from Roman and medieval regimes in which felons who were lucky enough not to be summarily tortured and killed would find themselves cast out into the woods. One history on English law portrays the convict as "a wild beast... not merely is he a 'friendless man,' he is a wolf." The dehumanizing origins of disenfranchisement are an acute reminder of how inconsistent the practice is with modern theories of criminal justice. Taking the right to vote away from a lawbreaker has nothing to do with safety or deterrence; if it is a form of retribution, it is unacceptably arbitrary, and many legal scholars believe that the stigma of disenfranchisement hinders a criminal's rehabilitation and contributes to recidivism.

Furthermore, while convicts are often deprived of their rights and liberties for reasons unrelated to punishment (an inmate's freedom of speech, assembly and religion are limited; an ex-con in many states is prohibited from holding certain jobs, serving on a jury and running for elected office), the right to vote is sup-

posed to receive our legal system's utmost protection because it is the fundamental democratic right that preserves all others. In fact, the Supreme Court has used this reasoning to strike down almost all formal barriers to the ballot box. Yet in a much criticized 1974 opinion, *Richardson v. Ramirez*, the court ruled that states could constitutionally disenfranchise offenders because of an obscure clause in the fourteenth amendment that, according to the Court, suggests states should not be penalized for disenfranchising citizens who participate in "rebellion, or other crime."

Since then, advocates for prisoners' rights and voting rights have virtually given up on the effort to enfranchise criminals, seeing it as a lost cause. Still, the legal establishment has been surprisingly supportive of voting rights for convicts. In 1981 the American Bar Association ambitiously recommended that "persons convicted of any offense should not be deprived of the right to vote." The American Law Institute's Model Penal Code says that convicts should be disqualified from voting only while imprisoned. Despite these guidelines, there is little hope for even a modest proposal like Representative Washington's (which applied only to non-imprisoned offenders and to federal elections) because criminals have neither political clout—note the Catch -22—nor any real base of advocates. Since suffrage for convicts can be won only on legal grounds, a new litigation strategy is needed that will circumvent the Supreme Court's dubious claim that states' disenfranchising laws are generally constitutional.

A novel yet promising strategy for civil rights advocates would be to use the

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Giving Cons the Vote (continued)

Voting Rights Act, the federal law that prohibits racial discrimination in voting, to challenge the disparate impact of these laws on minorities. The Supreme Court itself planted the seeds for this strategy when it ruled in a 1985 decision, *Hunter v. Underwood*, that an Alabama law disenfranchising certain offenders was unconstitutional because it was adopted in 1901 with racist intent and continued eight decades later to have a disproportionate effect on blacks. (At the turn of the century, many Southern states used criminal disenfranchisement laws, along with literacy and property tests, poll taxes and grandfather clauses to restrict black suffrage.) As a challenge on constitutional grounds, *Hunter*, required a showing of discriminatory intent, but challenges brought under the Voting Rights Act do not require such evidence. When Congress amended the Act in 1982, it explicitly dropped the intent test in favor of a simpler results test. Now, a state election law or scheme violates the act if it *results* in a protected minority group having less opportunity to participate in the political process than any other group in the electorate. Presumably, then, a plaintiff need only trot out statistics showing the lopsided racial breakdown of a convict population that is denied the right to vote in a given state.

The numbers are fairly damning: In Illinois, where inmates are denied the vote, 63 percent of prisoners are black. Yet blacks make up only 15 percent of Illinois's general population. In New York, where offenders on parole are prohibited from voting, 49 percent of parolees are black and 31 percent are Latino. Blacks make up 16 percent, and Latinos 12 percent, of the total population of New York. In Florida, where convicts on probation are disenfranchised, 26 percent of probationers are black, and approximately 50 percent are Latino. Florida's general population is 14 percent black and 12 percent Latino. Although figures for ex-offenders are unavailable, one could extrapolate the racial breakdown of this population from numbers such as those presented above. (Those who argue that these skewed rates merely reflect crime patterns in these areas will have to explain away an extensive body of scholarship showing the pervasiveness of racial discrimination at every stage of our

criminal justice system, including arrest, conviction and sentencing.)

States that disenfranchise criminals may try to counter evidence of disparate racial impact by arguing that they have a legitimate interest in keeping offenders out of the voting booth. But they won't get far. First, courts that hear Voting Rights Acts claims rarely give weight to a state's attempts to justify a law that violates the act's results test, particularly when the case deals with outright vote denial, as opposed to vote dilution caused by a districting scheme. Second, the justifications states offer for disqualifying criminals from the electorate are all weak or constitutionally problematic. States will come up short, whether they argue that disenfranchisement is part of a convict's punishment or a non-punitive attempt to protect the "purity of the ballot box"—an old yet common canard with racial overtones of its own.

Beyond the principle of universal suffrage, there are important reasons to let criminals vote. As a New York state inmate seeking the franchise recently wrote in a letter to the *Daily News*, "[voting] has rehabilitative attributes, as it gives the prisoner a sense of belonging, instead of confirming isolationist feelings toward society." Convicts and ex-cons could also use their votes to hold politicians accountable for inhumane prison conditions. (Liberal and progressive political candidates might even find a sympathetic constituency here.) Finally, guaranteeing the vote to criminals might have "rehabilitative attributes" for society at large, forcing us to rethink the barriers we erect between law abiding and law-breaking citizens, and exposing the stupidity of an anti-crime strategy that attacks criminals more than it attacks the causes of crime.

[Reprinted from *The Nation*, December 20, 1993, which reprinted it from the November, 1993, *Yale Law Journal*.]

Lifers Vote In General Election

The Lifers' Group, Inc. of Massachusetts Correctional Institution at Norfolk, succeeded in providing all of the nearly 1,300 prisoners there the opportunity to register and vote in the 1993 November General Election. The group's leaders presented a petition to the Norfolk Town Clerk with the requisite number of certifiable signatures in compliance with state registration law, permitting the prisoners to be considered registered voters rather than absentee voters.

While prisoners in Massachusetts have been able to vote in past elections, their votes were not cast as registered voters. Rather, the voters were treated as absentee votes from the cities or towns where the prisoners had lived before incarceration. Votes cast in this manner, it was discovered, were placed in escrow and not counted.

Through the Lifers' work, prisoners now are able to cast votes and have their votes count just as any registered voter on the outside. In the future, a representative of the Town Clerk's office will enter the prison and register every prisoner who wishes to exercise his right to vote.

[Taken from the Fall 1993 *Life Lines*, the newsletter of the Life-Long CURE]

Drugging of Prisoners Upheld

Albert Sullivan is an Illinois state prisoner forcibly drugged against his will for the past five years. Sullivan filed suit under § 1983 claiming that he has a due process right to stop taking the drugs long

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enough to prove he does not need them. He also challenged the Illinois procedures used to administer the drugs. The district court ruled in favor of prison officials on all issues and the court of appeals for the seventh circuit affirmed.

The appeals court begins "while there is something disturbing about the prospect of a prisoner forever surrendering to prison doctors his right to be free of unwanted mind altering drugs, we conclude that *Harper*, (*Washington v. Harper*, 494 US 210, 110 S.Ct. 1028 (1990)) sanctioned this possibility, we therefore hold that Illinois may constitutionally force Sullivan to take psychotropic drugs without allowing him to become drug free to prove that he could do without them."

The court upheld the lower court ruling which upheld the constitutionality of Illinois' procedures to forcibly drug prisoners which were enacted shortly after the *Harper* decision.

In analyzing Sullivan's claims challenging the pre-*Harper* drugging policy, the court held that it did not violate the constitutional requirement of due process because such a right was not clearly established prior to *Harper*. The court held that even if such a right did exist the defendants would be entitled to qualified immunity.

The court gave a lengthy analysis of both the *Harper* ruling and the current Illinois procedure for the forced drugging of prisoners. It notes that Sullivan has not been left "unable to speak in his own defense or robbed him of the capacity to think cogently,..." The court postponed deciding whether Illinois can force drugs on a previously undrugged prisoner before the prisoner has exhausted his administrative appeals because those facts were not present in this case.

The court notes that Sullivan will receive regular hearings before a treatment review committee where he can argue he does not need mind-altering drugs to behave in prison. "How such hearings will further enlighten doctors about Sullivan's need for medication is a question that the Supreme Court has surrendered to the medical profession. From a lay perspective it seems highly unlikely that Sullivan's current keepers will ever change their minds about him-which is not to say that the doctors are wrong, but only to observe that future hearings for Sullivan may be a pointless formality." See: *Sullivan v. Flannigan*, 8 F.3d 591 (7th Cir. 1993).

OK State Courts Can Hear Prison Suits

Dennis Waldon is an Oklahoma state prisoner. He was infracted and punished in a prison disciplinary hearing resulting in the loss of one hundred days of good time credits. Waldon filed a writ of habeas corpus and/or mandamus in the Alfalfa County district court claiming that prison officials had not followed DOC rules in his disciplinary hearing thus rendering the loss of good time unlawful. The district court declined jurisdiction based on its belief that even if Waldon was correct, he would not be entitled to release from prison within 60 days. Waldon then appealed to the Oklahoma state supreme court which transferred the case to the Court of Criminal Appeals.

The appeals court held that Oklahoma state district courts have jurisdiction to hear challenges to prison disciplinary hearings by state prisoners. "...this Court has exclusive jurisdiction to determine issues relating to credit time for the reduction of a sentence, then concomitant with such jurisdiction comes the responsibility to fashion appropriate remedies when rights have been violated. This court finds that a writ of mandamus must lie against appropriate prison officials when a prisoner's minimum due process rights have been violated. The District Court's action is a due process review only, and not an appellate review of the decision of the disciplinary authority. Therefore, we abandon our previous requirement that the only remedy available for sentence credit right violations is a writ of habeas corpus when entitlement to immediate release can be shown. *Mahler v. State*, 783 P.2d 973 (Okla. Cr. 1989); *Ekstrand v. State*, 791 P.2d 92, 95 (Okla. Cr. 1990)."

Consent Decree Creates Right to Uninspected Legal Mail

In 1976 prisoners at the Indiana State Reformatory in Pendleton, IN filed suit challenging the conditions at the prison. In 1977 the parties entered into a consent decree settling the suit. With respect to legal mail the decree provided that it would not be opened, read, censored or copied and its delivery would not be interfered with. Upon reasonable suspicion legal mail could be opened for the limited purpose of physically inspecting it for contraband. In 1979 the Indiana legislature enacted a statute nearly identical to the language of the decree.

In 1982, Jack Duckworth, warden at the Indiana State prison, enacted a policy whereby all legal mail was opened by prison staff in the prisoner's presence and inspected for contraband. This policy withstood constitutional and statutory scrutiny. See: *McChristian v. Duckworth*, 610 F.Supp 791 (ND IN 1985), affirmed in part, reversed in part, 978 F.2d 1261, 1992 WL 311884.

In 1989 Duckworth became warden of the Reformatory at Pendleton. In 1992 he instituted a policy similar to the one at the State Prison whereby legal mail would be opened in the prisoner's presence by staff and inspected for contraband.

James Kindred, a Reformatory prisoner, responded by moving the trial judge to hold a hearing, enforce the consent decree and find Duckworth in contempt. Kindred claimed that a Reformatory counselor had opened two pieces of legal mail in his presence after he had refused to open it in the counselor's presence. Prison officials could not articulate any reason to believe the envelopes in question might contain contraband.

The district court denied Kindred's motion, holding that the consent decree did not establish, modify or define substantive constitutional standards dealing with the opening of confidential mail. The court of appeals for the seventh circuit reversed and remanded.

The appeals court begins by noting that consent decrees are contracts between parties which often contain relief beyond the bare minimums mandated by the constitution. The court specifically held that the consent decree in this case provided Reformatory prisoners with a substantive right to receive incoming legal mail without interference unless reason-

Continued on next page

able grounds existed to believe that the mail contained contraband. While Duckworth could well have initiated this policy at another prison, in this case he could not because his predecessors had bargained away his ability to implement the policy.

The court rejected Duckworth's argument that subsequent actions by the Indiana Legislature undercut the consent decree in this case. The court stated that prison officials can seek modification of consent decrees under Fed.R.Civ.P. 60. But until they do so, and a district court permits modification of the consent decree, the decree must be followed and enforced as written and agreed to. See: *Kindred v. Duckworth*, 9 F.3d 638 (7th Cir. 1993).

Stay of Suit Not Appealable

Oscar Bean is a Missouri state prisoner. He filed suit claiming he was denied due process at a disciplinary hearing accusing him of assault. He sought declaratory relief, damages and attorneys fees.

The district court granted the defendants' motion to stay Bean's suit for 90 days pending the exhaustion of the certified grievance procedure under 42 U.S.C. § 1997e, stating that the grievance procedure may provide Bean with the relief he seeks and that case law suggests that the grievance procedure is part of the due process prisoners receive during the disciplinary process. The Missouri DOC grievance procedure has been certified by the district court. Bean appealed the stay of his suit.

The court of appeals for the eighth circuit affirmed and dismissed the appeal, holding that stay of an action is not a final appealable order. Because an order staying a civil rights action pending exhaustion of a certified grievance procedure does not have a collateral estoppel or *res judicata* effect on federal court action it is not subject to immediate appeals. The stay order does not conclusively determine his claim and Bean is not precluded from continuing with his suit after an adverse decision by the grievance review process. Bean is not deprived of any right to present his original claims in federal court thus he cannot appeal the stay. See: *Bean v. Dormire*, 10 F.3d 538 (8th Cir. 1993).

Prison Officials Can't Prevent Jailhouse Lawyers From Assisting Other Prisoners

Paul Gibbs is a Michigan state prisoner and jailhouse lawyer. He was placed in segregation in late 1990 for possessing contraband. On April 2, 1991, he was reclassified back to the general population. Due to a lack of bed space he remained in segregation. On April 8, 1991, he allegedly threatened a nurse, was infraacted and sentenced to more segregation time. That disciplinary sentence expired on May 12. Gibbs did not receive his mandatory classification during June; in July a classification committee recommended that Gibbs remain in segregation. In August the committee recommended Gibbs release from segregation, Gibbs was actually released on October 18, 1991.

Gibbs filed suit under § 1983 claiming that he was denied procedural due process when he was not reclassified to segregation after completing his 30 day sentence on May 12 and that such a reclassification was required, and that failure to do so deprived him of a liberty interest without due process. He also raised a substantive due process claim in that his prolonged stay in segregation was in retaliation for his activities as a jailhouse lawyer assisting other prisoners to sue prison officials for civil rights violations. The district court dismissed Gibbs' claims holding that the failure to reclassify him did not state a federal constitutional claim, where Gibbs did not claim that state remedies were inadequate, and that the state classification procedure did not violate federal constitutional standards. The lower court dismissed the retaliation claim by holding that prisoners have no right to assist other prisoners in legal matters; thus, in the absence of such a right, there could be no unlawful retaliation. The court of appeals for the sixth circuit affirmed in part, reversed in part and remanded.

The appeals court affirmed dismissal of the claims concerning remaining in segregation. The court notes that the due process clause does not subject prisoners' classification status to judicial scrutiny unless the regulations in question have created a due process liberty interest in their enforcement. The court went on to hold that, assuming Gibbs was entitled to a hearing after he was required to remain in segregation, the claim was barred because Gibbs had an adequate state law remedy. "Gibbs' procedural due process claim turns on an interpretation of state law. If state law has procedures adequate to consider the claim for damages for the asserted violation, there is no procedural due process violation. There has been no suggestion in this case that state judicial procedures are inadequate."

The appeals court reversed dismissal of Gibbs' substantive due process claims alleging retaliation. The court notes that prison officials may not retaliate against prisoners who sue; to do so violates prisoners' right of access to the courts. While there is no constitutional right for prisoners to assist other prisoners with their litigation, "courts have recognized that prisoners are entitled to receive assistance from jailhouse lawyers where no reasonable alternatives are present and to deny this assistance denies the constitutional right of access to the courts."

In *Johnson v. Avery*, 393 US 483, 89 S.Ct. 747 (1969) the Supreme Court held that state statutes or regulations cannot bar prisoners from providing legal assistance to other prisoners unless it provides reasonable alternatives. "Here, segregation of a 'jailhouse lawyer' in retaliation for providing legal aid is equivalent to the prison regulation barring assistance in *Avery*. Each instance is an example of state action by prison officials which may result in a denial of access to the courts. If proven to be true, said actions are unconstitutional. Thus, while there is technically no independent right to assist, prison officials may not prevent such assistance or retaliate for providing such assistance where no reasonable alternatives are available." The court held that Gibbs should be given an opportunity to amend his complaint to properly allege a constitutional claim of denial of access to the courts, including an allegation that there were no reasonable alternatives which ensured access to the courts for prisoners at the Chippewa Correctional Facility.

The lower court denied Gibbs' attempts to conduct discovery which would allow him to substantiate his claims of retaliation in this case. For example, one defendant claimed Gibbs' monthly review was inadvertently skipped because he was on vacation. Gibbs presented documents with the defendants' initials on them which would indicate

the defendant was at the prison and not on vacation as he claimed. The appeals court noted that evidence that the defendant was lying about his presence at the prison on the dates in question would cast doubt on his assertion that the failure was negligent rather than retaliatory. "It is disingenuous at best for defendants to assert that Gibbs' failed to establish that the initials he relied on were made by Hopkins' ..., when they refused to answer his interrogatories to Hopkins on this very point." Thus, the lower court abused its discretion in denying Gibbs an opportunity to conduct discovery to prove his retaliation claims. See: *Gibbs v. Hopkins*, 10 F.3d 373 (6th Cir. 1993).

AZ DOC Denies Court Access

This case deals with a class action suit filed by Arizona state prisoners. They claimed that Arizona prison officials denied them access to the courts by enacting policies that unduly abridged their ability to file and litigate court actions. The district court ruled in the prisoners' favor on all counts. This is an excellent ruling for jailhouse lawyers, especially those in control units.

The court ruled that the "paging system" for legal materials, where prisoners denied access to the prison law library must submit a request for specific legal materials to be brought to their cells, was constitutionally deficient and did not provide adequate access to the courts.

Untrained prisoner legal assistants cannot provide constitutionally adequate access to the courts for prisoners denied physical access to a law library. This is especially true for illiterate or non-English speaking prisoners for whom law books alone cannot ensure access to the courts. In the absence of a program providing prisoners with lawyers or paralegals the ADOC must maintain a sufficient number of minimally trained prisoner legal assistants.

To be adequate a prison law library must be staffed by a person with adequate legal training. A law library staffed only by security officers untrained in legal research and writing is insufficient.

The court noted that a prison policy which forces prisoners to choose between purchasing hygienic supplies and essential legal supplies is constitutionally un-

acceptable. The ADOC established a \$22.00 indigency standard. The court held this was insufficient for a prisoner to purchase both hygiene supplies and legal supplies. An earlier order by this same judge, setting an indigency standard of \$46.00 a month, was affirmed on appeal in *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991). That indigency standard was applied to this case as well.

The court held that the prisons require a policy to assure that legal documents submitted by prisoners to be photocopied remain confidential and are not read by other prisoners or staff. Thus, the current ADOC policy which allows staff or prisoners to photocopy prisoner's legal materials outside of their presence is unlawful.

The court held that the ADOC also denied prisoners' confidential attorney calls. The lack of a central policy allows individual prisons to set arbitrary standards which permit the improper denial of calls to counsel. Prison staff are not required to justify the denial in writing. Prisoners are often forced to speak to their attorneys on monitored phone lines or within hearing range of staff. This denied the prisoners their right of access to the courts.

The court ordered extensive injunctive relief to remedy these problems and appointed a special master to monitor conditions and assist in developing a plan for injunctive relief. See: *Casey v. Lewis*, 834 F. Supp 1553 (D AZ 1993).

Witnesses May Be Subpoenaed at Government Expense

Larry Williams was a prisoner in the Poinsett County, AR, jail. He filed suit challenging various conditions at the jail as being unconstitutional and that the sheriff threatened him in an attempt to prevent him from pursuing the suit. After an evidentiary hearing, the district court ruled in favor of jail officials, dismissing the suit. The court of appeals for the eighth circuit reversed and remanded holding that the Magistrate Judge's decision not to appoint counsel for Williams, in combination with confusion over Williams' witness list, was an abuse of discretion. The appeals court did not reach the merits of the claims.

Prior to the evidentiary hearing Williams requested appointment of counsel. The court denied the request, finding that Williams appeared capable of presenting his case which was neither legally nor factually complex. On August 7, 1992, Williams filed a pleading requesting that the court subpoena various witnesses for the hearing. On August 12, 1992, the court set the matter for trial and sent Williams a pre-printed court form for listing witnesses. Williams filled out this form and returned it to the court, he did not list any of the witnesses on the August 7 list. Using only the second list the court subpoenaed only one non-party witness.

At the hearing only Williams, the defendants and one non-party witness were present. Williams was confused about the absence of his witnesses and requested a continuance to subpoena his witnesses noting he had requested the court to subpoena 12 witnesses.

The appeals court held that while counsel may not have been necessary when he first requested it, that changed. By the time the matter was scheduled for trial the court should have appointed counsel because it was apparent Williams was confused about the court's customary pre-trial procedure. The appeals court held that the lower court abused its discretion in holding Williams to a strict standard of compliance with the court's rules and by denying his continuance to subpoena the witnesses listed on the August 7 list.

The denial of counsel was compounded by the court's failure to subpoena any of the witnesses listed on the August 7 list. "28 U.S.C. § 1915(c) authorizes the trial court to issue and serve process in proceedings *in forma pauperis*. The decision to grant or deny subpoenas for indigent parties at the expense of the Government is within the discretion of the trial court. We have defined the discretion the trial court exercises as a 'range of choice.'"

In its remand order the appeals court instructed the lower court to consider the August 7 witness list and determine if any of the witnesses' testimony would be relevant to the proceeding. If so, the court should subpoena them and hold an additional evidentiary hearing where their testimony can be considered and ruled on. If the court determines none of the witnesses should be called, it should state its reasons for reaching this conclusion. See: *Williams v. Carter*, 10 F.3d 563 (8th Cir. 1993).

Evidence Required to Sustain Disciplinary Ruling

Robert Nicholson is a Rhode Island state prisoner. In 1988 he told prison officials and state police investigators that he had been assaulted by two prison guards. His complaint was later investigated by the FBI and Department of Justice (DOJ). The DOJ concluded that there was insufficient evidence upon which to prosecute the guards and that their actions did not constitute a prosecutable violation of federal criminal statutes based upon the available evidence.

Upon receipt of the DOJ correspondence the prison's deputy warden, Ronald Brule, instituted disciplinary proceedings against Nicholson for providing false information. This was done pursuant to an unwritten rule initiated by Brule whereby prisoners complaining of staff assaults were automatically infraacted if no criminal charges were initiated against the guards or the prisoner failed to provide sufficient conclusive evidence to substantiate the allegation.

At the disciplinary hearing Nicholson was found guilty and sentenced to thirty days loss of good time and 30 days in segregation. The only evidence at the hearing was Nicholson's complaint and the DOJ correspondence concerning their investigation.

Nicholson filed suit claiming that the policy of filing disciplinary charges against prisoners who complain of assaults violated his first amendment right to petition the government for the redress of grievances; that the disciplinary hearing violated due process and that the DOC had failed to promulgate rules and policies regarding the retaliatory charging policy.

The district court held that the practice of only *charging* prisoners who complain of staff assaults did not violate the first amendment because no punishment or other significant action resulted from the charge alone. The court ruled that the constitutional inquiry should instead focus on the disciplinary hearing itself rather than the charges leading up to it.

While holding that there is nothing unconstitutional about punishing prisoners who make false accusations against guards, in this case nothing supported the finding that Nicholson's allegations were false. The court noted that Rhode Island disciplinary hearings are governed under a consent decree known as the "Morris Rules" which require "substantial evidence" to support a disciplinary committee finding of guilt. The constitutional requirement set by the US Supreme Court only requires "some evidence". In this case, the court ruled, there was no evidence to support the finding of guilt so the court did not decide what level of review would be appropriate.

The court notes that just because the government chooses not to prosecute a case or insufficient evidence exists to bring criminal charges does not mean that the prisoner has in fact lied about being assaulted. "In sum, the disciplinary board had before it *no* evidence supporting the conclusion that Nicholson's allegations were false. It violated the minimum standards of due process required by law."

The court held that there is no federal constitutional requirement that prison officials promulgate rules concerning free speech. Thus, the failure to promulgate the charging policy in writing, which may violate state law, is not cognizable in a federal section 1983 suit. See: *Nicholson v. Moran*, 835 F. Supp 692 (D RI 1993).

Prisoner Litigants Have Right to Out of State Citations

Rick Petrick is an Oklahoma state prisoner. The sentence he is serving in Oklahoma was enhanced as a result of prior convictions from Minnesota and North Dakota. While confined at the Oklahoma State Penitentiary (OSP) he sought to bring collateral attacks against the out of state convictions. The OSP law library did not have the relevant materials. The law librarian contacted both the Minnesota and North Dakota attorney general's office to obtain the materials but refused to authorize the expenditure of funds to obtain the needed materials. Petrick filed a grievance with the OSP warden and itemized the specific legal materials he needed to conduct his research. The warden denied the grievance which was affirmed on administrative appeal.

Petrick filed suit in district court claiming that the lack of out of state materials with which to challenge the out of state convictions violated his right of access to the courts. The court dismissed the suit finding that OSP officials had not violated Petrick's right of access to the courts. The court of appeals for the tenth circuit reversed and remanded.

The appeals court explains the standard under which it applies *Bounds v. Smith*, 430 US 817, 97 S.Ct. 1491 (1978) which mandates prisoner's right of meaningful access to the courts. "When a state denies an inmate's request for the necessary resources to prepare a petition, and thereby infringes that inmate's constitutional right of access to the courts, we must determine whether the prison's policy is reasonably related to legitimate penological interests."

As a threshold matter, the appeals court held that Petrick had adequately shown injury as a result of being denied the requested legal materials. The court held that "The constitutional guarantee of 'adequate, effective, and meaningful' access to the courts would mean little if a state could satisfy its affirmative duty by a mere failed attempt to accommodate an inmate who has identified a specific research problem and who would otherwise be unable to pursue that legal claim without obtaining the legal materials." The cost of obtaining the requested materials does not justify their denial. Moreover, the defendants had not shown that the cost of accommodating Petrick's request would have been expensive or otherwise harmful to prison interests.

The court noted that instead of providing Petrick with law library access it could have provided him with the assistance of counsel or other person trained in the law. "Having exercised its prerogative under *Bounds* to afford Petrick law library facilities rather than legal representation, Oklahoma owed Petrick a duty to provide adequate legal resources to him."

Prisoners are required to state with some degree of particularity the cases they need. Thus, Petrick's request for a "controlling case on accepting guilty pleas within the State of North Dakota" was overly broad. However, his remaining requests which cited specific cases should have been provided.

Prisoners must also articulate the need for the requested material with sufficient particularity so that the prisoner's need can be balanced against legitimate

penological interests. "This does not require the prisoner to *prove* the materiality of the materials sought as a predicate to the right to receive such material. That, of course, will often be impossible. ...a prisoner's constitutional right of access to legal resources is not conditioned on a showing of need.... However, there must be a general allegation of need sufficient to enable a prison to determine the legitimacy of the request." All of these conditions were met in this case. The court remanded the case back to the lower court for further proceedings. See: *Petrick v. Maynard*, 11 F.3d 991 (10th Cir. 1993).

Visitor Awarded Damages

A man visiting his brother in jail was awarded damages both for battery and for violation of his civil rights, based on a guard's attack on him and making of racially derogatory remarks. On appeal, the Minnesota state appeals court ruled that because the racial slurs were coupled with the beating, showing that racial animus provided motivation for the battery, the racial discrimination and the battery were inseparable and that damages for both constituted double recovery.

The appeals court ruled that the plaintiff, in electing to claim attorney's fees, which were only available under the civil rights claim, had chosen to proceed only with the civil rights claim. Accordingly, it ordered that the plaintiff receive \$8,000 in damages and \$23,928 in attorney's fees on that claim and overturned a jury award of \$48,693 in compensatory and \$65,000 in punitive damages on the battery claim. See: *Rosenbloom v. Flygare*, 487 N.W.2d 546 (Minn App. 1992).

The Minnesota State Supreme Court disagreed and reinstated the jury's award, while reducing the punitive damages in the battery claim from \$65,000 to \$30,000. The court held that because the battery was compensable not simply because it was racially motivated, but also because the plaintiff was physically injured. These injuries would have been compensable even without the racial motivation. The civil rights claim, however, was that the plaintiff visitor had been discriminated against on the basis of race in being denied access to visitation of a relative in prison. Thus, the court held there was no "double recovery." See:

Atheist Challenges AA Probation Requirement

Robert Warner was convicted of drunk driving in New York state and sentenced to three years probation. One of the probation conditions was that he attend meetings of Alcoholics Anonymous (AA). Warner is an atheist and objects to compulsory attendance of AA meetings because of AA's emphasis on god and spirituality. He did not object to alcohol treatment as such. Warner filed suit under § 1983 claiming that state mandated attendance of AA meetings violates the establishment clause of the constitution.

The district court denied the defendants' motion to dismiss. The case has far reaching implications for parole, probation and prison imposed AA attendance.

The court notes that atheism falls within the protection of the first amendment because the government cannot impose religious requirements on non-believers anymore than it can favor one religion over another. The court held that the risk of being incarcerated if he did not attend AA meetings met the Supreme Court's definition of "obligatory." The court held that, based on the facts in this case, it could not conclude that AA did not have an objectionable religious component.

Of interest to prison readers is that the court addressed the defendants' claim that AA attendance was a prison policy. The court held that even though not a prison policy, the probation requirement would be considered as such and analyzed according to the reasonableness test of *Turner v. Safely*, 482 US 78, 107 S.Ct. 2254 (1987).

The court notes that AA is widely used in prisons across the country. Because of the compulsory nature of attendance, Warner's means of exercising his first amendment rights were not clear. Because a request for alternative treatment was readily acquiesced to, the court held that the impact of accommodating such rights in the county penal system would not be significant. This overcame the presumptive validity of prison policies. See: *Warner v. Orange County Department of Probation*, 827 F.Supp 261 (SD NY 1993).

Phone Co. State Actor for § 1983

Milton Griffin-El is a Missouri state prisoner. He filed suit against MCI Telecommunications Corporation and state prison officials over the phone company's practice of announcing to persons called by prisoners that the calls originated from a prison. The court upheld MCI's practice of paying it's 25% commission to the Missouri state General Revenue Fund rather than to the DOC's Human Resources Canteen Fund. Because this a developing area of prison law this case should be studied by those contemplating litigation concerning prison phone systems.

The district court ruled that by entering into a contract with the Missouri DOC, MCI became a state actor suable under 42 U.S.C. § 1983. The legal test to determine if a private party is or has become a state actor for 1983 purposes is whether the private party has acted with, or obtained significant aid from state officials or otherwise done as the state commands. See: *Lugar v. Edmondson Oil Co. Inc.*, 457 US 922, 102 S.Ct. 2744 (1982). In this case MCI and the Missouri DOC had a symbiotic relationship and both fiscally profited from it. See: *Burton v. Wilmington Parking Authority*, 365 US 715, 81 S.Ct. 856 (1961).

The contract for phone services entered into by the parties required that MCI operators (only collect calls are allowed) tell call recipients that the caller is a prisoner. Griffin-El contended that this practice of "branding" violated his constitutional right to privacy. The court disagreed.

The court upheld the announcement practice on several grounds. First, the court ruled Griffin-El had failed to show that it violated any constitutional right. The court then assumed that even if any right were violated, the announcement practice served an important penological goal of preventing harassing and fraudulent phone calls. Lastly, the Federal Communications Act, 47 U.S.C. § 605, allows the person transmitting the collect call to inform the recipient who is placing the call and it's origin.

The court held that Missouri prisoners have no federal liberty or property interest in seeing that the phone commissions go to the inmate benefit fund rather than the

Continued on next page

Phone Company (continued)

state's general fund. However, the court ruled that Griffin-El may have a valid claim because he is the intended third party beneficiary of the MCI/DOC contract. But such a claim must be brought in state court as a contract claim, not in federal court as a civil rights claim. Lastly, the court held that even if the defendants had violated any of Griffin-El's rights they were entitled to qualified immunity because such rights were not clearly established at the time of the violation. See: *Griffin-El v. MCITelecommunications Corp.*, 835 F. Supp 1114 (ED MO 1993).

Improper Testimony Requires Reversal

Ronald Davidson is a New York state prisoner. He filed suit claiming that a prison guard had destroyed his legal materials after they had an altercation. The case went to trial. The guard's attorney, from the state's Attorney General's office, sought to admit evidence to the jury that Davidson had been in a mental hospital. The district court denied the request holding that it was irrelevant to the case and unduly prejudicial.

At trial the attorney general asked the last witness if he had ever known Davidson. The witness said he had, and upon further prompting by the AG, said he had known Davidson when he escaped from the Mattaeawan Facility for the Criminally Insane. Davidson sought a mistrial which the court denied. The judge instructed the jury to "obliterate the testimony" from their minds. The jury ruled in favor of the prison guards.

The court of appeals for the second circuit reversed and remanded. The court held that, weighing the merit of the case, Davidson had a strong case where the witness's credibility was crucial to the jury verdict and it could not be said that the improperly elicited testimony did not tip the credibility balance in favor of the defendant.

The court held that a retrial was necessary because the efficacy of the curative instruction was uncertain and that the AG's eliciting of the testimony was "a deliberate bad faith maneuver" in fla-

grant disregard to the district court's prior order. The court held there is no litmus test to determine when eliciting prejudicial information in violation of a court order will warrant a new trial. However, given the facts in this case, the court held that the curative instruction given by the judge were insufficient. See: *Davidson v. Smith*, 9 F.3d 4 (2nd Cir. 1993).

Accessible Facilities Required for Disabled

In a class action suit, Arizona state prisoners challenged the lack of access for mobility impaired prisoners to bathrooms, showers and cells, delays in receiving medical devices and hearing aids and violations of the Rehabilitation Act.

The court found that the Arizona DOC houses 68 prisoners confined to wheelchairs or who are partially paralyzed or have artificial limbs. Most of them were denied access to bathrooms, showers and cells because of their disabilities. The court held this situation violated the eighth amendment. It approved a plan whereby the defendants agreed to make at least one unit for each security level accessible to disabled prisoners and to then concentrate the disabled prisoners in these units. This would eliminate the eighth amendment violation. Because many of the agreed upon renovations had been delayed due to funding problems the court ordered continued monitoring of the situation.

The court did not find any harm caused by delays in obtaining medical equipment, thus no claim was stated. Delays associated with obtaining hearing aids were resolved by a new policy. The plaintiffs also failed to prove any constitutional violations regarding blind prisoners.

The court gave an extensive discussion of the Rehabilitation Act of 1973, 29 U.S.C. § 504 and 794, and its application to prisons. The court held that the plaintiffs had failed to state a claim under this act because they did not identify particular programs from which handicapped prisoners were excluded due to their handicaps, thus no violations of the Act were established. [Note that the term "handicapped" is used by the court, apparently because that is the language used in the statute.] See: *Casey v. Lewis*, 834 F. Supp 1569 (D AZ 1993).

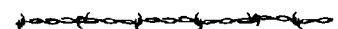
ISRB Must Follow Own Rules

Charles Cashaw was a Washington state prisoner. He filed a Personal Restraint Petition (PRP, a state habeas petition) challenging the actions of the Indeterminate Sentence Review Board (ISRB) in setting a minimum prison term to coincide with his court imposed maximum sentence. The court of appeals had granted Cashaw's PRP at 68 Wn.App 112 (reported earlier in PLN). The state supreme court affirmed the lower court but on different grounds.

In this case the state supreme court held that the ISRB's procedural guidelines concerning the parole of prisoners do not create a due process liberty interest. "...Passage of the SRA [Sentencing Reform Act] does not in any significant way channel the board's discretion in determining rehabilitation. This determination cannot be reduced to a simple equation under which predictable outcome would flow from specific factual predicates. Accordingly, the Board's regulations as to the procedures to be followed in reaching this decision, even if important, do not create a liberty interest."

Despite this, Cashaw was still entitled to PRP relief. "Regardless of any due process implications, an inmate filing a PRP may be entitled to relief merely by showing that the Board failed to follow its own procedural regulations in setting a minimum term." Prisoners may obtain PRP relief by showing either a constitutional violation or a violation of Washington state law.

The court commented that the ISRB had erred in ordering Cashaw imprisoned for his maximum term. "Cashaw should have been given one more parolability hearing prior to the expiration of the maximum term, assuming he earned available good time credits. This is because an inmate becomes eligible to be considered for parole once the minimum term (less good time credits) is served." Not doing so "fails to give effect to good time credits in violation of RCW 9.95.070 and should not continue." See: *Personal Restraint of Cashaw*, 123 Wn2d 138 (1994).



FL Reforms Sentencing Law

Florida has built 10,729 new prison beds in the past five years yet has been unable to keep up with its growing prison population. In May of 1993 the Florida legislature passed the Safe Streets Initiative which has the goal of reducing prison overcrowding to ensure that violent and repeat offenders are not released early. The new law went into effect on January 1, 1994. The new sentencing guidelines will help state judges determine who will or will not go to prison.

The primary effect is that there will be fewer convicted felons going to state prisons as opposed to county jails. The FL DOC expects 208 fewer new admissions this year as a result of the law. The effort to increase time that violent criminals stay in prison means that criminals classified as nonviolent, such as thieves and drug traffickers, won't reach the threshold to be sent to prison. This leaves counties with the choice of housing the nonviolent felons in local jails or releasing them.

State lawmakers also decided to virtually eliminate public corruption as a crime, requiring over 60 convictions before a public official could be sent to prison. A prosecutor who specializes in public corruption cases said: "This is an outrage, a terrible message to put out. Think how many municipalities you have to rip off before you go to prison." Among other changes by the new sentencing guidelines are:

- Establishes a new point system for determining whether a convict is sentenced to prison.
- Requires the legislature to provide money for more prisons if lawmakers pass new laws that affect prison sentences.
- Makes it easier to project future prison bed needs.
- Eliminates "basic" gain time. Under the previous law prisoners received 10 days for each month they served.
- Increases "incentive" gain time for positive activities from the current 20 days per month to up to 25 days for prisoners convicted of nonviolent of-

fenses. It remains 20 days for violent offenders.

- Repeals the 3 year mandatory minimum sentences for the purchase and possession with intent to sell illegal drugs 1,000 feet from a school.
- Repeals 3, 5 and 10 year mandatory minimum sentences for drug trafficking.
- Repeals the 3 year mandatory minimum sentence for an assault or battery on adults over the age of 65.

Medical Claims Standards Discussed

Ronald Brewer is an Iowa state prisoner. He suffers from coronary artery disease. Employees of Correctional Medical Services (CMS), a contractor with the Iowa DOC, prescribed medicine for Brewer's illness but the treating doctor made an error in the dosage. Brewer filed suit claiming that he was denied the correct dosage of medication in an effort by CMS to minimize its costs. The district court dismissed the suit, holding that Brewer had failed to state a claim.

The district court gave an extensive overview of the history of the eighth amendment, the legal standards applying it to prison conditions in general and deliberate indifference to prisoner's serious medical needs in particular. It explains the subjective and objective components that a prisoner must prove in order to prevail on an eighth amendment claim. The court cited numerous cases from all circuits discussing all these aspects. This case should be read by anyone litigating an eighth amendment claim as it provides useful reference and a good starting point for further research.

In this case Brewer failed to state a claim because the error in prescription dosage was due to a misunderstanding by the treating physician rather than deliberate indifference to his medical needs. Negligence and malpractice, while actionable in state courts, do not constitute eighth amendment violations. The court cites cases touching on virtually every type of physical ailment that has claimed an eighth amendment violation. See: *Brewer v. Blackwell*, 836 F. Supp 631 (SD Iowa, 1993).

VT Class Action Suit

On December 13, 1993, lawyers from the National Prison Project of the American Civil Liberties Union, together with Vermont attorney Mitchell Pearl of Langrock, Sperry and Wool, filed a class action lawsuit against the State of Vermont on behalf of all Vermont prisoners. Filed in federal district court in Burlington, the suit, *Goldsmith v. Dean*, seeks an end to the unconstitutional deprivation of such basic human needs as medical and mental health treatment and safe environmental conditions. The case also challenges two behavior modification programs as sadistic and pseudo-therapeutic.

"Medical and mental health care in the prisons are dangerously deficient," reported National Prison Project attorney Marjorie Rifkin. "Prisoners and prison staff in Vermont's overcrowded facilities are exposed to infectious diseases including tuberculosis. Those with chronic illnesses like diabetes and heart disease get sicker due to inadequate medical treatment. We hope that our legal action now will prevent prison conditions from getting worse as the population expands. Ultimately, the Department's failure to treat prisoners' medical and mental health problems increases the costs and risks to the community when prisoners are released," according to Rifkin.

Among the behavior modification programs challenged in the law suit is the Vermont Treatment Program for Sexual Aggressors (VTPSA). According to the complaint, it is forced on many prisoners who have never been convicted of, or even charged with, a crime of sexual aggression. The complaint alleges that prisoners in the program must periodically submit to having their genitals attached to a penile plethysmograph, a gauge to measure their sexual arousal, while they are subjected to slide shows and soundtracks portraying "deviant" sex acts, such as violent rapes and sex with children. Prisoners in the VTPSA are also required to masturbate until ejaculation while voicing "acceptable" sexual fantasies, and then to continue masturbating for an additional hour while voicing "deviant" fantasies. These ses-

Continued on next page

VT Suit (continued)

sions are tape-recorded and played to other inmates and staff. If prisoners' "deviant" fantasies are deemed to be insufficiently graphic or lewd, then VTPSA staff accuse them of being "in denial" and therefore ineligible for parole. Prisoners are further required to confess to sex crimes, unproven and uncharged, with no grant of immunity from prosecution, and are considered "in denial" if their confessions do not conform to the "correct" versions dictated to them by staff.

WA Civil Commitment Challenged

As reported in the December, 1993, issue of *PLN* the Washington state supreme court upheld the provisions of the Community Protection Act which mandates indefinite confinement of persons deemed to be "sexual predators" until such time as they are "cured." On January 25, 1994, nine prisoners confined under this law filed a class action suit in US district court in Seattle challenging their labels as sexual predators and the civil commitment proceeding used to confine them. They also claimed that they were being denied treatment stating that the Special Offender Center, a DOC run prison in Monroe, Washington, is being run like a prison rather than a treatment center.

On March 28, 1994, a jury returned a mixed verdict in the above case. The jury agreed that one of the plaintiffs', Richard Turay, constitutional rights were violated by not being provided with adequate mental health treatment. Turay was awarded \$100 in damages. Karen Jones, Turay's attorney said: "I think the jury verdict confirmed our view that this is a prison, not a mental health facility."

The jury ruled in favor of prison officials by holding that Turay's civil rights were not violated by policies that included opening the prisoners' mail and restricting their movements around the prison. The jury deadlocked on several other issues, such as whether restricting visiting hours and subjecting the prisoners to strip searches violates their constitutional rights. The parties were to decide

whether to have a new jury trial on these issues or allow the judge to decide them.

Bob Boruchowitz, of the Washington Defender Association, informed the *Seattle Times* that he plans to file a federal habeas corpus petition on behalf of the civilly committed prisoners challenging the fact that they are confined after their terms of imprisonment have expired.

Hearing Required Before Denial of IFP

Khalid Alexander is a Nevada state prisoner. He tried to file suit and requested *in forma pauperis* status in order to proceed without paying the normally required filing fees. The Nevada district court has a policy of requiring prisoners to pay a partial filing fee based on either the value of their assets or their average income, whichever is greater.

Alexander had 29¢ on his account when he filed suit but had an average income of \$27.67 over the preceding six months. The district court required him to pay a five dollar filing fee based on it's chart. Alexander filed a motion asking the court to reconsider it's order stating that he had no assets, had lost his prison job and no longer had an income. The district court denied the motion but gave Alexander an additional 60 days in which to pay the partial filing fee. The court of appeals for the ninth circuit reversed and remanded.

The appeals court noted that a district court may consider a plaintiff's cash flow in the recent past and may also require a plaintiff to justify the depletion of a previously adequate account.

The appellate court held "Before the court requires a fee greater than the plaintiff's assets based on a recent depletion of an account, however, it must notify the plaintiff and give him a chance to show that the depletion was not a deliberate attempt to avoid the filing fee.... When a prisoner has lost his source of income, a fee based on his average income over the past few months may be inappropriate."

The appeals court remanded the case for Alexander to have an opportunity to explain why he had no funds to pay the five dollar filing fee despite a recent average income of \$27.67 a month. See: *Alexander v. Carson Adult High School*, 9 F.3d 1448 (9th Cir. 1993).

Qualified Immunity Hinges on All Relevant Law

While this is not a prison case we are reporting it because it is a Supreme Court ruling affecting qualified immunity defenses. Qualified immunity allows government officials to escape liability for money damages, even when they violate constitutional rights, as long as the right violated was not "clearly established" at the time. This defense is commonly asserted by prison officials and should be studied and researched by civil rights litigants prior to filing suit.

The case involves an Idaho citizen arrested after police surrounded his home and demanded he emerge to surrender. Police did not have a warrant for his arrest. He filed suit under 42 U.S.C. § 1983 claiming that the arrest without a warrant was unconstitutional. The district court held that while the law was clear that a warrant was required before an arrest could take place within a home, the law was unclear as to whether a warrant was required when police surround a house and demand an individual to come outside and surrender. Finding no controlling precedent, the district court dismissed the suit holding the police officers were entitled to qualified immunity.

On appeal the ninth circuit appellate court found a case that neither of the parties had brought to the district court's attention, which held that it was unlawful for police to surround a citizen's home, demand their surrender and arrest them without a warrant. The appeals court held that because the plaintiff had not brought the case to the lower court's attention he had forfeited his right to benefit from it. The appeals court affirmed the lower court's dismissal. The Supreme Court reversed.

In a brief opinion the Supreme Court held that appellate review of qualified immunity dispositions must be conducted in light of all relevant precedents, not simply those cited to or discovered by the district court. The supreme court notes that the central purpose of the qualified immunity doctrine is to protect public officials from undue interference with their duties and potentially disabling threats of liability. The ninth circuit's ruling does not further these goals.

"Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts...' That question of law, like the generality of such questions, must be resolved *de novo* on appeal." "A court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.'" See: *Elder v. Holloway*, 54 CrL 2165, February 23, 1994.

Prisoner Beating Filmed

The January 5, 1994, issue of the *New York Times* reported that two New York state DOC guards, Korey Gordon and Edward Sharrow, had been fired after they were caught on video tape brutally beating prisoner Jason McDade. McDade was handcuffed and not resisting when the guards struck him on the head and legs with their batons. The attack occurred at the Great Meadow State Prison in Comstock.

NY DOC spokesperson James Flateau stated that the NY DOC does not tolerate excessive use of force against prisoners and will immediately discipline guards involved in abusing prisoners. Two other guards involved in the incident, who did not beat McDade but lied about the incident and tried to cover it up, were suspended without pay for six and nine months, respectively.

A *PLN* reader at Comstock who wishes to remain anonymous, had this to say: "Such brutality is routine in this 'end of the line' prison, but it is rare that it is caught on videotape and even rarer that such a tape is released. Once the film was out there, they had to dismiss the two guards. The commissioner made a ringing statement about not tolerating abuse.

"What none of the media reported is that the captain who sent the film to Albany (DOC headquarters), rather than suppress it, and the Deputy Superintendent for Security who backed him, have both been booted out of here to comparable ranks at other facilities but as a clear indication of reproach. Of course the media will never deal with how routine the brutality is."

Petty Drug Criminals Fill BOP

Attorney General Janet Reno ordered a study to determine if the growing use of mandatory minimum sentences was causing overcrowding in the federal prison system. The study, produced by former Deputy Attorney General Philip Heyman, the BOP and selected U.S. Attorneys, found that 16,316 or 21.5% of federal prisoners have no violence in their records, no involvement in sophisticated criminal activity and no previous prison time.

These prisoner's average sentence was 81.5 months which meant they would serve about 69 months. Their average sentences were about 2.5 times longer than before sentencing guidelines and the 1986 Anti-Drug Abuse Act imposed mandatory minimum sentences for drug and weapons crimes. Two out of three received mandatory minimum sentences. 42.3% were couriers or played peripheral roles in drug trafficking. The length of the sentence had no effect on whether they returned to crime. Many defendants are receiving prison time who would have previously received probation. Despite the study the congress and senate are continuing the expanded use of mandatory minimums and increasing the penalties for an ever wider variety of crimes.

NJ Prison "Emergency" 12 Years Old

On January 20, 1994, New Jersey governor Christie Whitman renewed a 12 year old "emergency" declaration that forces counties to keep more than 3,600 state prisoners in their jails and accept the state's payment rate. As earlier reported in *PLN* the New Jersey state supreme court had imposed an April 22, 1994, deadline to end the "emergency". The court ruled that given the continuing problem the state had to stop using emergency powers granted under the Disaster Control Act. The court did not tell the governor what she should do but noted that the legislature could pass a law declaring a continuing emergency and give the state the

power to continue the current system.

Starting in January, 1994, the state increased from \$45 to \$58.50 the amount it pays the county per day per prisoner. The increase will cost \$7.1 million through June 30, when the current budget expires.

This spring the state will break ground on a \$200 million, 3,500 bed prison in Bridgeton, the largest state prison ever built. The first 500 beds should come on line by the Spring of 1995, with the remainder becoming available in 500 bed increments after that. As of December, 1993, there were 23,133 New Jersey state prisoners, including 3,629 housed in county jails under the emergency decree. State prisons and youth facilities are operating at 133.5% of design capacity. In 1981 the prison system held only 7,940 prisoners. The increase is due to harsher sentencing laws. Since 1981 the state has expanded every existing state prison, opened a prison on land leased from the federal government on Ft. Dix and opened three new prisons. The new prisons, which cost more than \$150 million to build, were designed to hold 3,000 prisoners but now hold more than 5,000.

Source: *Corrections Digest*, January 26, 1994.

CDC Spreads Gangs

According to the *Intelligence Operations Bulletin*, published by the California Attorney General's office, the California DOC's policy of trying to remove prisoners from their "negative" (i.e. city) environment is contributing to the spread of gang membership in rural areas.

Cited as an example was the Los Angeles Court policy which, as a term of probation, requires gang members to "move at least 100 miles southeast of Los Angeles. As a result, cities in western Coachella Valley area, located about 100 miles from Los Angeles, are experiencing an increase in crimes perpetrated by individuals associated with Los Angeles-based criminal street gangs."

Another "carrier" of this problem was seen to be the proliferation of gang members in rural area group homes. Intended to relocate gang members to non-gang surroundings, this action, instead, "does nothing more than transplant gangs to a new area and expedite the expansion of the gang problem throughout California."

DOJ Orders MS Jails Closed

The U.S. Department of Justice (DOJ), citing conditions such as maggot-infested cells, racially segregated holding cells, fire hazards and a high number of jail suicides, has ordered the closing of jails in four Mississippi counties, Neshoba County, Sunflower County, Lauderdale and Jones County.

The DOJ also cited more than a dozen other jails throughout the state as having routinely substandard or dangerous conditions which violate prisoners' constitutional rights. Jails not ordered to close must improve conditions or face federal suit. New jails are planned for the four counties forced to close their facilities.

The 1993 investigation was held in response to an unusually high number of suicides, 47 since 1987, in Mississippi jails. The DOJ is still investigating some of those incidents because of accusations that the suicides were preventable or were actually murders. State officials deny the allegations.

The DOJ found serious problems in staffing, medical care, training and sanitation. In some cases, basic suicide prevention techniques such as removing detainee's shoe laces, were not followed.

Source: *Corrections Today*

Informants Must Be Reliable

John Brewer is an Ohio state prisoner. While held at the Southern Ohio Correctional Facility (SOCF) in Lucasville he was incarcerated for stabbing another prisoner. At his disciplinary hearing he was found guilty of aggravated assault based on statements by confidential informants. The finding was upheld on appeal by the warden but reversed by the Ohio DOC Director. By that time Brewer had spent nearly eight months in segregation.

Brewer filed suit claiming that his due process rights were violated when the disciplinary board did not independently find that the informants were reliable. The district court agreed. The court held that in this case the disciplinary board did not provide a written basis from which to conclude that the confidential informants were reliable. They did not produce any circumstantial evidence supporting the

testimony of the informants nor did they state that the informants had been reliable in the past.

The court ruled that while this violated Brewer's due process rights the defendants were entitled to qualified immunity because prisoner's right for informants to be independently evaluated was not established in the sixth circuit until 1988. The events in this case arose in 1986. See: *Brewer v. Seiter*, 838 F. Supp 340 (SD Ohio 1993).

Prison Rape Survivors Sought

Stop Prisoner Rape (SPR) is a non-profit organization dedicated to stopping the all too common practice of sexual assaults within prisons and jails. SPR has recently received numerous media requests where television programs, magazines and journalists are seeking prison rape survivors to interview for news stories. If you are a prison/jail rape survivor and interested in speaking publicly about it please contact: SPR, 3149 Broadway #4, New York, NY: 10027. (212) 666-0344.

Guard's Attack for Smoking States Claim

Allain Norman was a detainee in the Norfolk County jail in Virginia. While being processed into custody he asked a trusty for a drag off his cigarette. As soon as he began to smoke, jail deputy Otis Taylor ran down the hallway and swung a heavy set of brass keys at his face. After two misses the keys struck Norman's right hand and injured it. Taylor also threatened Norman. Norman filed suit claiming that his right to be free of cruel and unusual punishment had been violated. Taylor denied ever striking or threatening Norman and claimed Norman was not only smoking but also creating a disturbance. The district court granted summary judgment in Taylor's favor holding that Norman did not adequately refute Taylor's statement that he was causing a disturbance, thus, force was justified. The court of appeals for the fourth circuit reversed and remanded.

The appeals court held that the relevant issue in this case was whether the force used was necessary. In this case, whether or not Norman was causing a disturbance was a material issue of fact. While Norman failed to expressly deny creating a disturbance, the court never directly asked him this nor did it give him an opportunity to clarify the matter. Norman was proceeding *pro se* so his pleadings should have been liberally construed. The lower court was required to tell Norman of the required degree of specificity and give him an opportunity to cure it.

The court notes that if Norman's claims are true, hitting a prisoner for such a minor violation of jail rules would support a finding that Taylor acted sadistically and maliciously to cause harm.

That no serious physical injury was suffered is immaterial. Norman's allegation of the initial and continuing physical and psychological injury is adequate to state a claim. See: *Norman v. Taylor*, 9 F.3d 1078 (4th Cir. 1993).

Justice Watch

By Dan Cahill

Justice Watch (J.W.) is a grass roots organization that supports prisoners, their families, and all who work for humane conditions until such time as prisons no longer mirror a society based on classism and racism.

J.W. organizes trips to Ohio and Kentucky prisons to help maintain ties between prisoners, their families and friends. They have also taken an active seat on the Ohio Council of Churches Task Force on Criminal Justice and the American Friends Service Committee's Community Action Board. They have organized three public forums to dialogue on urgently felt prison issues in the community. J.W. has taken the first step to help organize a home for people coming out of prison, and has been granted funds to put a "people's library" inside this group's home. They maintain an office, meeting place, phone, one paid staff and a large circle of volunteer workers. They publish a newsletter that is free to prisoners that deals mostly with prison issues.

They are working hard to educate the public about the issues and problems in the prison system, and they are helping to raise the social consciousness of prisoners.

J.W. has helped link prisoners with attorneys that are willing to take on cases that involve civil rights. They have also been listed as a plaintiff in a civil action against

Justice Watch (continued)

prison officials. Prison officials attempted to outlaw and repress J.W.'s involvement with the prisoner rights and prison reform movement by calling it "gang activities."

Justice Watch is a strong and active prisoners' support organization. They need the support of prisoners, our families and friends, in order to unify our movement in this state. They need all the support they can get. I hope to see our movement and those involved in the struggle for social change rallying to the support of Justice Watch. It is through organizations such as this that we will be able to unite in our struggle. Contact: Justice Watch, 932 Dayton St. Cincinnati, OH. 45214. (513) 241-0490.

Prisoners Employed By PIA Seek Minimum Wages

By Mark Merin

Prisoners who have worked for the California Prison Industries Authority ("PIA") have filed a lawsuit in the United States District Court in Sacramento to obtain minimum wage for their work (now \$4.25 per hour) instead of the pittance they now receive. If this case is successful and the provisions of the Fair Labor Standards Act which require employers to pay minimum wage are applied to California prisoners employed by PIA, prisoners may be entitled to back wages, and the PIA may be ordered to pay minimum wage to all employees in the future.

The State of California opposes the extension of the federal minimum wage laws to California prisoners, arguing that the prisoners are not "employees", but rather are receiving training and rehabilitation opportunities. Furthermore, the State has maintained that the PIA employment serves a penological purpose.

Unions have traditionally opposed the introduction of prisoner-made goods into commerce because they compete with union-made goods and undermine the wage levels of union labor. Presumably, they should support an increase in prisoner wages.

More than 1,000 past and present employees of the California PIA have already joined the lawsuit by filing their consents and by signing retainer agreements with the law firms involved in the lawsuit. Additional California prisoners who have worked with PIA at any time since August of 1989 may join by writing Mark E. Merin at Dickstein & Merin, 2001 P Street, Suite 100, Sacramento, CA 95814, and requesting a copy of the complaint, the consent form, and the retainer agreement. Progress in the lawsuit will be reported regularly in the California Prisoner and *PLN*.

Chelan County Jailer Jailed

Bob Conklin, the chief of corrections for Chelan County, WA. was arrested on child molestation charges in January, 1994. Since January 13, 1994, he has been held in protective custody in the King County jail, unable to post bond. Prosecutors claim that the 50 year old Conklin molested five teenage boys and an 11 year old boy by pretending to conduct medical exams during which he fondled the boys. Conklin is not a doctor and has no medical training.

Conklin is a former FBI agent, army military intelligence agent, King County and Kitsap County deputy prosecutor. After entering private practice in 1981 he experienced financial difficulties resulting in the loss of his home due to liens filed against it by other attorneys. Bankrupt, suspended by the state bar association he became Chelan's chief of corrections for \$36,000 a year. It appears Conklin's jail and, presumably prison, experience will round out his law enforcement career.

Ask The Media If Crime Pays, Then Who's Footing The Bill?

By Dan Pens

A recent survey by the Center for Media and Public Affairs shows that the three major networks aired more than twice as many crime stories last year as in 1992—even though the crime rate remained virtually unchanged. The networks are cashing in on crime, it seems, in response to the popularity of the crime-crazed TV tabloid shows.

The average American's main exposure to crime is not what they witness first hand. Our perception of crime in America is largely spoon-fed to us by the media. Double the amount of air time for crime. In one year. Is it any wonder, then, why the public's fear of crime is now at record highs? Is it a coincidence that fear-driven reactionary legislation of the three-strikes variety is sweeping the country? What better way for politicians to ensure the continuation of their careers than to demonstrate the get-tough-on-crime attitude that voters demand?

California recently passed a three-strikes bill, close on the heels of Washington State's new law passed by voter initiative. It didn't take the California State legislature long to realize that even though such a law makes for poor social policy, the payoffs in terms of voter popularity are too much to pass up. The *Los Angeles Times* quoted California Assembly Speaker Willie Brown (D-San Francisco) as saying the politicians have zero courage because, "they like their jobs and want to be reelected." When asked why he did not use his powerful office to modify the bill, he said, "I got out of the way of this train because I'm a realist."

He went on to say he had no idea how the state was going to pay for the massive costs three strikes will bring. In 1984 California spent 14.4% of it's budget on higher education, and 3.9% on corrections. This year the state will spend more on corrections than higher education for the first time in its history.

The runaway train that Speaker Brown says he got out of the way of is being stoked by the public's fear of crime. That fear is based on the perception of crime they get largely from the media. The media is driven by competition and the profit motive. Maybe speaker Brown should consider introducing a "media crime tax". After all, why should the American public be taxed to it's knees and the American underclass be swept into the jaws of the swelling criminal justice machine while the American media laughs all the way to the bank?

Slaves of the State

By Paul Wright

Many people have the mistaken impression that slavery was outlawed or abolished in the United States after the civil war by the passage of the 13th amendment. Unfortunately, that was not the case. The 13th amendment reads: "Neither slavery nor involuntary servitude, *except as punishment for crimes whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction." The effect of the 13th amendment was not to abolish slavery but to limit it to those who had been convicted of a crime.

The reality was made apparent in the aftermath of the civil war when large numbers of newly freed black slaves found themselves "duly convicted" of crimes and in state prisons where, once again, they labored without pay. Until within the last 20 years it was common practice for state prisons to "rent" prison labor out to private contractors in a modern form of chattel slavery. This situation led the Virginia Supreme Court to remark in an 1871 case, *Ruffin v. Commonwealth*, that prisoners were "slaves of the state." All that has changed since then is that the state is less honest about its slave holding practices.

Until the 1930's most state and federal prisons were largely self sufficient, producing most of the goods and food they consumed and even produced a surplus, for sale, of food and some industrial products. In many states prisoners even served as armed guards (until the mid 70's the state of Arkansas held some 3,000 prisoners with only 27 civilian employees) and many other functions which required minimal investment by the state. Prison self sufficiency and excess production for profit largely ended during the mid-30's when the US was in the midst of the depression and both unions and manufacturers complained about competing against prison made products on the open market. In most manufactured products the labor cost is the most expensive component. Cut the labor cost and the resulting profit margin increases. With a prison labor force working at no cost the state and federal prisons could easily compete against any private manufacturer and workers. One of the laws passed was the Ashhurst-Summers Act

which prohibited the transport in interstate commerce of prison made goods unless the prisoners were paid at least minimum wage.

Prison labor did not start to become a major issue again until the 1980's. Until then most prison produced goods were either for use within the prison system or sale to other state agencies, license plates being the most famous example. This began to change when the US's massive prison building and incarceration binge began to gather steam. In a 1986 study designed to reduce the cost to the government of its prison policies former Supreme Court Justice Warren Burger issued the call for transforming prisons into "factories with fences." In essence, prisons should once again become self sustaining, even profit producing, entities requiring minimal financial input from the state. The "factories with fences" proponents seek to turn the clock back to the times when prisoners were merely slaves of the state.

While some think that slavery, i.e. unpaid, forced labor, offers enormous profit potential for the slave owner there are historical reasons slavery is no longer the dominant mode of economic production. First, the slave owner has a capital investment in his slave, regardless of whether the slave is working or producing profit he must be fed, housed, etc. in minimal conditions to ensure the slave's value as a labor producer remains. With the rise of industrial capitalism in the 18th and 19th century capitalists discovered that capitalism has its boom and bust cycles characterized by over-production. Thus idle slaves would become a drain on the owner's finance because they would still require feeding, housing, etc., regardless of whether they were working. However, if the slave were "free" he could be employed at low wages and then laid off when not producing profit for the employer, the wage slave was free to starve, free to be homeless, etc. with no consequences for the owner.

Another reason slavery was inefficient compared to wage slavery was that the slaves would occasionally revolt destroying the means of production and killing the slave owner. More common and less dramatic were the acts of sabotage and destruction that made machinery, with its

attendant capital investment, impractical for use by slaves. So by the middle of the 19th century wage slaves employing machines could out produce, at greater profit for the factory owner, chattel slaves using less easily damaged, more primitive machinery.

The problem slave owners of old faced was what to do with non-producing slaves. Today's slave owners, i.e. the state, faces the opposite problem of having idle slaves who must be fed, clothed and housed whether or not they produce anything of value. The current thinking goes that any potential profit produced by prison slaves is better than none.

Some of the proponents of prison slavery try to disguise it as a "rehabilitation" or "vocational" program designed to give prisoners job skills or a trade which can be used upon their release. This is not the case. First, almost without exception the jobs available in prison industries are labor intensive, menial, low skill jobs which tend to be performed by exploited workers in three places: third world dictatorships, by illegal immigrants in the US or by prisoners. Clothes and textile manufacturing is the biggest and most obvious example of this. Second, because the jobs don't exist in the first place the job skills acquired are hardly useful. Does anyone expect a released prisoner to go to Guatemala or El Salvador to get a job sewing clothes for the US market at a dollar a day? Third, if it's rehabilitational then why not pay the prisoner at least minimum wage for his/her work? Fourth, it ignores the reality that the US has at least 8 or 9 million unemployed workers at any given time, many of them highly skilled, who cannot find jobs that pay a meaningful wage to support themselves. So called "job retraining" programs are a failure because all the training in the world won't create jobs with decent wages. In pursuit of higher profits, i.e. lower salaries, US and multinational corporations have transferred virtually all labor intensive production jobs to third world countries. If prisoners are going to be exploited as slave labor it should be called what it is.

The US has little problem condemning the export of prison made goods from China. What makes this rank hypocrisy is the fact that the same criticisms leveled

by the US government against Chinese prison made goods can be leveled at US prison made goods. According to a March 18, 1994 story in the *Seattle Times* prison made goods from California and Oregon are being exported for retail sales. In a supreme irony, the California DOC is marketing its clothing lines in Asia, competing against the sweatshops of Indonesia, Hong Kong, Thailand and of course, the ubiquitous Chinese. The "Prison Blues" brand of clothes, made by prisoners in the Oregon DOC, has a projected sales of over \$1.2 million in export revenues. US State department officials were quoted saying they wished prison made goods were not exported by state DOC's because it is being raised as an issue by other governments. Namely the Chinese, which have cited US practices in response to criticisms. For their part the Chinese have announced a ban on the export of prison made goods while the US is stepping up such exports.

The California prisoners making clothes for export are paid between 35 cents and \$1 an hour. The Oregon prisoners are paid between \$6 to \$8 an hour but have to pay back up to 80% of that to cover the cost of their captivity. As they are employed by a DOC owned company this is essentially an accounting exercise where the prisoners' real wages are between \$1.20 to \$1.80 an hour. Still competitive with the wages paid to illegal immigrant sweatshop workers here in the US and wages paid to garment workers in the Far East and Central America.

Fred Nichols, the administrator of Unigroup, the Oregon DOC prison industries was quoted saying: "We want them to work in the same environment as on the outside" in terms of hiring interviews and such. Yet obviously this does not include the right to collective bargaining and union representation which are of course common to the labor process outside prisons and would teach important rehabilitational values such as collective dispute resolution, the principle of a fair wage for work, etc.

Companion articles to this one detail conditions in the federal prison system's Unicolor, California state industries, etc. While the particulars may change the trend continues towards increased exploitation of prison slave labor. Some states, especially those in the South such as Texas, Arkansas, Louisiana, etc., still have unpaid prisoners laboring in fields supervised by armed guards on horseback, with no pretense of "rehabilitation"

or "job training." In those states the labor is mandatory, refusal to work brings harsh punishment and increases prison sentences served.

In 1977 the Supreme Court decided *Jones v. North Carolina Prisoners' Labor Union* which removed the notion that the courts will offer any protection for the idea of prisoner union organizing. In the past, PLN has reported on efforts and court cases to seek minimum wage for prison laborers. For the most part such efforts through the courts have been unsuccessful with courts bending over backwards to read exemptions (which are not written) into the federal Fair Labor and Standards Act (FLSA). Still, the litigation should continue to chip away on that front.

On the political front, we must expose prison slavery for what it is and at the same time seek collective bargaining for safe working conditions, fair pay, etc. It took workers in this country nearly 160 years to obtain this in 1934 and it has since been whittled away. So it will be neither easy nor quick. The problem that slave owners of old faced is still faced by modern slavers, namely resistance by the slaves. To the extent that private business run slave operations in prisons, there is the massive state subsidy that they receive and for state run enterprises there are the hidden costs. Under guise of "security" go the enormous expenses associated with guards, checkpoints, controls, etc., that are otherwise not present with wage slaves on the outside. The occasional mutiny by irate slaves with concomitant loss of production, capital investment in machinery, etc. is likely to occur and deter private ventures.

In Washington the state offers a lot of incentives for private businesses to employ prison slaves. Class I venture industries pay no rent, electricity, water or similar costs. They are exempt from state and federal workplace safety standards, pay no medical, unemployment or vacation/sick leave to slaves who have no right to collective organizing or bargaining. In a case like this we are seeing welfare capitalism where private business is getting a handout from the state at taxpayer expense. One which, I suspect, will largely swallow the profit paid back to the state under guise of taxes, room and board, etc. by the prisoner. To the extent that prison slaves are forced to pay state and federal taxes there arises the question, linked to the right to vote, of taxation without representation. If forced to pay

taxes like any other citizen, under guise of rehabilitative or vocational employment, then why not the right to vote given other taxpayers?

Workers on the outside should also be aware of the consequences that prison slave labor has for their jobs. Ironically, as unemployment on the outside increases, crime and the concomitant incarceration rate increases. It may be that before too long people can only find menial labor intensive production jobs in prisons or third world countries where people labor under similar conditions. The factory with fences meets the prison without walls.

Prisoners = Profit

By Anthony Sciarrino

With all the attention that the media has lavished on our national "drug problem," and the painfully slow growth of our economy, it is surprising that so little attention has been paid to one of the fastest growing industries in the U.S., Federal Prison Industries, Inc. (FPI).

In 1974 there were 35 federal prisons, with a total population of only 23,500. Over the next four years that number grew to 30,000. Then, in 1979, the federal prison population declined by more than 10 percent to 26,300. While to the average citizen this trend might seem to reflect a decrease in federal crimes, and therefore be a good thing, to Federal Prison Industries it was a trend that could have seriously affected their plans for the future.

Federal Prison Industries, started in 1934 by an Act of Congress and Executive Order, was originally intended to alleviate the debilitating idleness prisoners suffered in federal penitentiaries. In the beginning FPI barely produced a surplus of goods after serving their own institutional needs. What started out as prison reform eventually turned into profit seeking enterprise. Today Federal Prison Industries is a half billion dollar industry, manufacturing everything from electronic control cables for NASA to office furniture for the Social Security Administration.

Change was slow for the first 45 years of FPI's existence. Then in 1980, neatly coinciding with Reagan's vigorous efforts to wage his drug war, all that changed. In 1978, under the Carter ad-

Continued on next page

Prisoners = Profit (continued)

ministration, FPI employed 6,500 prisoners and 700 civilians at the 35 federal institutions. By the end of 1992, after 12 years of Republican guidance, there were 103 federal institutions with 113 FPI factories employing more than 16,000 prisoners and 1,500 civilians. This growth was fueled, not by what is perceived by the general public as rampant growth of violent crime, but as a result of the war on drugs.

To quote a 1979 FPI sales brochure, "Anyone who expresses an interest in the system of criminal justice, needs to understand the significant contributions prison industry has made in the past and can offer in the future." With this Freudian slip, FPI was tipping its hand to one of the primary motivations behind the federal government's new found interest in the arrest, conviction, and incarceration of its citizens.

Far from its humble beginnings, and humanitarian intentions, FPI's main concern is expansion. According to an internal document dated June 30, 1993, entitled, "A Vision for the Future," "... the time has come to modify its [FPI] internal functions to operate successfully in any market, with any partner, and with any business... the new marketplace has a requirement that mandates truly competitive requirements for price, quality and customer service."

In an article in the February 1993 issue of *Wood & Wood Products*, a furniture industry trade publication, "most executives representing the largest U.S. contract furniture makers remain skeptical of a quick turnaround for office and institutional furniture sales." The article goes on to quote John Axel, senior vice president of HON Industries, as saying, "I think that 1993 will be a difficult year of painful recovery for the U.S. economy, and it will affect the U.S. contract furniture industry with company layoffs and people having to find new jobs."

That is everyone except FPI. With their ever growing virtual slave labor force—average pay is 92¢ an hour—FPI's only concern is expanding fast enough to fill the Federal Government's ever increasing demands. In the contract furniture industry, one of FPI's largest divisions, the average annual sales volume in 1992 of the 25 largest private companies was \$211 million. FPI's sales rivals any of these companies and with their planned expansion will soon dwarf them all.

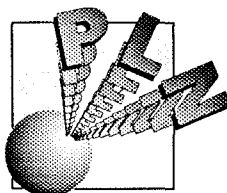
According to the *Monday Morning Highlights*, a federal Bureau of Prisons (BOP) publication, on July 22, 1993, a conference of representatives "from private industry, organized labor, the Federal Prison System, Correctional staff, the Justice Department and other interested parties was held in Washington D.C. This summit was the outcome of a process begun in 1990, when Congress directed FPI to commission an independent study of FPI's impact on private business and labor." "The study, conducted by the accounting firm of Deloitte and Touche, concluded that FPI's operations do not have an undue impact on the furniture... industry. The study went on to add, that with the substantial increase in prison population, FPI employment must also increase. This further expansion... of FPI in existing product lines would adversely impact the private sector."

Keeping in mind that present legislation mandates that FPI sales be restricted to federal government agencies, it is interesting to note some of the ways suggested by Deloitte and Touche to increase inmate employment. They recommended: "Legislation permitting FPI to manufacture and sell on the open market products that are currently produced offshore, and mandatory set-aside legislation for FPI requiring private sector government contractors to subcontract a portion of their awards to FPI."

There are many ways to lessen the impact FPI has on private industry, including limiting any new expansion of prison industry to noncompetitive areas of operation, such as recycling. Also, raising the pay for prisoners employed in industries that compete directly with private enterprises to the minimum wage would force FPI onto a level playing field with the private sector.

An even more effective means of reducing the need for employing prisoners would be to rethink the drug enforcement policies pursued by the federal government. There is little wisdom in any policy that creates more problems than it solves.

Reprinted from *Z Magazine*



News in Brief

UK The British government began a pilot study to set up a genetic DNA database of convicted criminals. Legislation pending in Parliament would expand police powers to take DNA samples from saliva and hair samples. A UK official was quoted as saying: "We will bring the full force of modern science to bear on the modern criminal." **WA** The State legislature approved its budget for the 1995 biennium. Following a 30% increase in the previous biennium's DOC budget this budget contained the following "cuts": \$2.6 million from closing the Monroe Honor Farm and Indian Ridge Corrections Center; \$7.2 million by delaying the opening of the 1,000 bed Airway Heights medium security prison near Spokane; \$7.5 million through savings in equipment, medical costs and staffing in state prisons. **GER** Kurt Franz, the last commandant of the Nazi Treblinka death camp was paroled recently by the German government. An estimated 300,000 Jews were killed at Treblinka during his tenure (no information was provided as to the number of Poles, Russians, Communists and others murdered at the camp during the same time). Franz had served 27 years of his life sentence. His release received virtually no publicity in the US. **WA** Washington State Reformatory prisoner Garrett Linderman pleaded guilty in Snohomish County superior Court to attempted second degree escape, a gross misdemeanor. The court sentenced him to one year in jail at the end of his prison term in 2004, but suspended it on condition he remain out of trouble in that period. Costs were waived except for the mandatory \$100 for the crime victims Compensation fund. Linderman allegedly tried to escape by hiding in the warden's fishing boat which was being refurbished in the prison machine shop. **CA** Off duty Los Angeles policemen Michael Terra and Ted Teyechea were arrested on charges of assaulting a peace officer after going on a shooting spree, firing their weapons from the open windows of their pickup truck. Among the things they fired at were the passengers of a moving bus and a California Highway Patrolman. No one was injured in the February 9, 1994, drive-by shooting. Both suspects were released on \$25,000 bail.

From the Editor

by Paul Wright

Welcome to another issue of *PLN*. This issue is kind of special. It marks the 4th anniversary of *PLN*, that's right, 48 consecutive issues! Our first issue appeared in May of 1990. For the first couple of issues it was kind of hit and miss as to whether or not we would survive. We've come a long way from the first issues which Ed and I typed in our respective prisons at Monroe and Clallam Bay with the 75 people on the mailing list and the xeroxed copies. In that same period of time we've seen a number of other prison publications come and go. We owe our longevity to the fantastic outside volunteers we've had over the years: Scott who helped with the printing when we needed it, Judy who desktop published us for almost two years, the two Carries who helped with the printing and mailings, Jim who has dutifully helped mail *PLN* for what seems like ages, Rollin who has handled our mail and banking almost from the start, Sandy who's done a fantastic job with the printing, Janie who helped with the mailings and our database of readers, the two Dan's who've done so much to ensure *PLN*'s successful computerization, Michael, Carol, Ann, Kris and all the other people who have, over the years, volunteered their time and energy to help *PLN* reach it's intended audience. And of course, we have to thank you, our readers, because without your financial support and encouragement we would not have gotten this far. When we started we had 75 people that we sent *PLN* to. Our US mailing list is hovering at about the 1,000 mark as I write this. Hopefully we will be able to continue growing and helping people help themselves.

We must also thank the folks at Arm the Spirit in Canada who, since the very beginning, have been able to distribute *PLN* to our readers in Canada, Latin America and Asia. The comrades at Oxford ABC in England, Durchblich in Germany and now Solidarieta Proletaria have been able to distribute and print *PLN* for readers in Europe and the Middle East. Without the help from these comrades we simply would be unable to afford to mail *PLN* outside the US due to the high postage costs. Their help has allowed our message to be read in some 22 different countries, our articles have been translated

and reprinted by a number of publications, both in the US and foreign countries. So while our voice is a small one, it gets around.

Everyone who reads the newspapers or watches TV is aware of the vicious campaign underway against prisoners, our families and supporters. All too often we are completely cut out of any debate or discussion on the issues that affect us the most. The mainstream media could care less what we, or poor people in general—in or out of prison—have to say. That is why we believe that it is important for publications like *PLN* to exist: so progressive prisoners and their supporters will have a voice and a means to exchange information and news. If we're going to be cut out of the mainstream media we need to form our own. You can support this process by telling your friends, family, attorneys, fellow prisoners, etc., about *PLN*, what we're about, and encouraging them to subscribe.

This issue of *PLN* has an extra four pages. I thought it would be a nice way to celebrate both our anniversary and the fact that this is Mayday, the international day of the working class. This issue of *PLN* has a "theme" which revolves around the idea of empowerment. As slaves of the state, prisoners are disenfranchised and not entitled to such basic elements of a true democracy such as the vote and a decent working wage. We have articles covering these issues and how we can give some thought to going about obtaining these fundamental rights. With rare exceptions the people in prison are poor, members of the working class or unemployed. Mayday is a day when we can reflect upon this and what needs to be done to change it. The right to vote and/or a minimum wage are not the solution to any of the many problems experienced by capitalist society. What they are is goals we can struggle for, organize around, build support for basic concepts of fairness and democracy which the current system is unable, and unwilling, to provide. When we can mobilize around these issues we can organize around others.

False optimism that winning these modest demands should be tempered by realizing that if voting could change the system it would be illegal! Pablo Serrano, a Libertarian political prisoner in Spain recently commented in a letter: "As to voting by prisoners, participation in

elections legitimizes the system in power, but beyond that it is a mean of establishing social consensus and as such is counter-revolutionary. Above all, given the current state of capitalism with its capacity for absorption and integration. Any electoral game thus, does not serve revolutionary interests because independently of how they set forth their ideas and messages, there is nothing they can do against the mechanism of a system fattening itself for even better domination. It is naive to participate. All struggle is about taking it to terrain which negates the system and in the electoral arena, for example, the task would be to organize sectors into not voting as a conscious act and in a permanent struggle which sets forth alternatives to the delegation of political, municipal and union democracy." Part of the reason we cover prisoners imprisoned as a result of the struggle for political, economic and social justice is because all these issues are linked together. Prison struggle does not sit alone in a vacuum. Prisons are a tool of social policy which are used to keep entire societies in line. Modest reforms here and there will not change this. The articles and content speak for themselves. We hope they will get folks to thinking about issues like economic democracy, real wages for real work and the role of prisons within the dominant economic system.

This issue of *PLN* also has a first: a paid ad. It was the ad which helped us afford the additional pages. The book advertised is written by a prisoner and is being made available to *PLN* readers at a discount; mention the fact that you saw the ad in *PLN* and you not only get a \$5.00 discount off the cover price but the publisher will donate \$1.00 per copy sold to *PLN*. Needless to say, please buy the book! A review is in this issue.

Because *PLN* is now being mailed from the east coast instead of Seattle the delivery dates you can expect to receive *PLN* has changed. East coasters will get it sooner while west coasters will get it later than they did. Everyone should have their issue of *PLN* by the end of the month, i.e. you should have received this issue by May 31st. Please don't write us inquiring about missing issues until the month is out. To ensure that you receive *PLN* in a timely manner please notify us of any address changes as the post office

does not forward *PLN* Check your address label and make sure it is accurate.

We have bulk copies of *PLN* available for distribution at events, fund raisers, etc., at little more than cost. Contact me for details. Enjoy this issue of *PLN* and please encourage friends and others to subscribe.

Algerian Prison Break

On March 10, 1994, guerrilla fighters of the Islamic front attacked the Tazult prison in the rugged Aures mountains of Algeria. Four guards were wounded and seven kidnapped during the attack which lead to at least 400 prisoners escaping. During the attack one guard and five guerrillas were killed.

Government forces using troops and helicopters recaptured 39 of the escapees in the days after the escape. Prison officials stated that about 280 of the escapees were members of the Islamic Front, many of whom were under sentence of death for terrorism.

The attack occurred in the early evening as prisoners broke the daily fast that marks the Muslim holy month of Ramadan. The prisoners had help from at least two guards according to the government.

Since 1992 the Islamic Front has waged a rebellion against the military government of Algeria after they were prevented from taking office when they won elections. Aside from several thousand dead, this has resulted in thousands of real or suspected Islamic Front supporters being imprisoned.

Chilean Prisoners Resist Control Unit Move

On February 20, 1994, Chilean prison officials transferred 48 political prisoners, members of the anarchist Lautaro movement and the Marxist Frente Patriótico Manuel Rodríguez (FPMR), to a recently completed control unit (CU) built within the old penitentiary of Santiago. A total of 200 political prisoners who have been arrested during the current government are scheduled to be transferred to the new control unit. In the CU prisoners will only be allowed 2 non-con-

tact visits a month from an approved list of four visitors. Prior to this prisoners were allowed twice weekly visits with unlimited numbers of friends and relatives in the prison gym. Prisoners will also have little contact with each other and will be subject to CU conditions similar to those used in the United States, Spain, Germany, etc. The prison was built by Spanish and German companies.

Rafael Escorza, a political prisoner said "we will resist this move even at the cost of our lives." The prisoners resisted the transfer with firearms leaving six people injured in the ensuing shoot out. To protest the prison transfer the FPMR and Lautaro revolutionaries bombed a police station on Feb. 21: on Feb. 22 they bombed a police academy: on Feb. 23 the headquarters of the governments ruling political parties were bombed. Four people were wounded in the attacks. An FPMR spokesperson said "Our objective is to obtain immediate freedom for the political prisoners."

Despite the nominal "democracy" in Chile, the government there holds hundreds of prisoners convicted of resisting the fascist Pinochet military dictatorship. Several groups and parties, including the FPMR and Lautaro Movement, have continued the revolutionary struggle which has resulted in even more political prisoners.

Book Review: Subpoena George Bush—The Anatomy of a Cover Up

by John Perrotti

Subpoena George Bush, by Aaron Caleb with Douglas Slaton, is the story of former Lucasville 14 member Richard Armstrong. For those unfamiliar with the Lucasville 14, they were fourteen prisoners confined at the Southern Ohio Correctional Facility in Lucasville, who, relying upon the Helsinki Agreement accord, renounced their United States citizenship and sought asylum in the former Soviet Union. Richard, along with other members, cut off his pinky finger to demonstrate the sincerity of his convictions and to protest their inhumane treatment. The prisoners sent the fingers to U.S. officials and the Soviet mission. During this time period the U.S. was focusing on Soviet dissidents and the Lucasville 14 sought to illustrate the fact that the American gulag also contains its own dissidents. It was at this time that Richard's political savvy became known to the U.S. Justice Department. (As *PLN* readers know, Lucasville was the scene of the bloody Easter siege and rebellion in 1993.)

The book takes us into the world of US espionage and covert actions. Upon Richard's release from prison, he engages in government-sponsored "counter-terrorism" with the Contra drug network until he is arrested in Portsmouth, Ohio. It is upon his arrest that the tangled web of intrigue unravels. When Richard's covert activities lead a trail all the way up to the office of then Vice President Bush, U.S. District Judge Wilhoit begins his own cover-up by exil-

ing him to the federal forensic prison in Butner, NC. That is the same prison where John Hinkley Jr. was sent after he shot President Reagan. The purpose behind the transfer was to silence Richard by attempting to label him insane.

Richard becomes the longest held pre-trial detainee, matching wits with the government's psychiatrists adept at chemically breaking those considered to be a threat. After four years and countless legal maneuvers, a deal is made by the government and Richard is released.

Throughout the history of this country covert operations have been a prevalent force utilized by the government to wreak havoc on the economy and leadership of third world countries. *Subpoena George Bush* provides an inside look at Contragate as well as the government's attempt to cover-up for its leaders' illegal acts.

I met Richard Armstrong at Lucasville in 1976. He was instrumental in my legal and political awakening. Of course, we all called him "Red" due to his hair and his politics. He is a good organizer and writ writer as well. Some of the legal proceedings described in the book get complicated and hard to follow and were definitely viewed through "Red's" eyes, who has a pretty big ego, but he's earned that over the years. It is a good, suspenseful book with plenty of intrigue and adventure to make great summer reading.

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Three Strikes Racks 'em Up

By Paul Wright

In November of 1993 voters in Washington state passed Initiative 593 which mandates life without parole for defendants convicted of one of 42 qualifying felonies for the third time. *PLN* covered the initiative process as it was unfolding at the time, [see the April, 1993, issue]. The first attempt, in 1992, failed to get the necessary 182,000 voter's signatures for the initiative to qualify for the ballot. It appeared that the 1993 effort would meet the same fate until, within the last few weeks before the July deadline by which initiatives must be filed with the secretary of state with the required signatures, the National Rifle Association (NRA)

pumped \$90,000 into the campaign (out of a total \$170,000 raised). This allowed for a massive direct mailing to citizens across the state as well as paying professional companies to gather signatures.

Washington voters passed Initiative 593 "Three Strikes You're Out" by a three to one margin. Since then California has passed a similar measure; about 30 states are considering some form of it and it is the centerpiece of Clinton's vaunted "anticrime bill." The proponents of 3 strikes claim it will keep "career criminals" off the streets and in prison. Within what passes for mainstream American politics today no one is seriously opposed to such measures (it should be noted that the American Correctional Association (ACA) and the Judicial Conference of the United States, which represents federal judges, have gone on record opposing 3 strikes legislation). The only dispute is how wide the net should be cast, i.e. all third time felons or just "violent" ones, life without parole or at least 25 years without parole, etc. This is hardly a debate.

Little noticed by the mainstream media are other effects these laws have had. The Washington 3 strikes law eliminated good time or other time reductions for several offenses, including murder, rape, robbery, etc. It also forbids placing wide categories of prisoners in any kind of work release, home detention, or similar type of facility. The California law requires sentences be served consecutively, restricts good time credits for California prisoners and limits prosecutors' ability to strike prior felonies in reaching plea bargains.

It seems that no one has pointed out that these laws have already been tried in the past. Until 1984 Washington had a "habitual offender" statute which man-

dated a life sentence for a defendant convicted of a felony for the third time. Most states have some version of this law on the books, its main purpose is to avoid trials whereby defendants will plea bargain to other charges in exchange for prosecutors agreeing not to "bitch" them. Occasionally the media reports the hapless defendant, usually in Texas, who gets a life sentence for stealing a carton of cigarettes.

Just who are these "career criminals" that are the focus of "3 strikes" legislation? Fred Markham once told me that prisoners reminded him of the Wizard of Oz. The Wizard said he was not a bad man, just a bad wizard. Likewise, the vast majority of prisoners are not bad men, just bad criminals. Anyone who has done time in prison will tell you that they are not filled with rocket scientists. Most of the people in prison are not evil nor professional criminals, they tend to be poor people with emotional, drug or alcohol problems who are caught doing something stupid. The "professional career criminal" tends to be a media myth, unless we count savings and loan bankers, Fortune 500 companies, Oliver North and company, etc.

About nine hours after California's 3 strikes law went into effect on March 7, 1994, Charles Bentely was arrested in Los Angeles and charged with the crime that could send him to prison for 25 years without parole: a 50 cent robbery. Donnell Dorsey, 37, is also looking at his third strike, for sitting in a stolen truck. The California law also doubles presumptive sentences for second time offenders.

In March, 1994, Samuel Page became the first person in the US convicted and sentenced under a "3 strikes" law. He pleaded guilty in Seattle. All told about

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Three Strikes (continued)

15 people in Washington state, mainly armed robbers and sex offenders, have been charged with a qualifying third strike. According to the latest report by the Washington Sentencing Guidelines Commission, in Fiscal year 1993, there were 204 defendants who would have qualified as "3 strikes" defendants had the statute been in effect at the time (the law took effect December 2, 1993).

On April 15, 1994, Larry Fisher, 35, was convicted of his third strike in Snohomish county Superior court in Washington. He will be sent to prison for the rest of his life. Fisher was convicted of putting his finger in his pocket, pretending it was a gun and robbing a sandwich shop of \$151 dollars. An hour later police arrested him at a bar a block away while he was drinking a beer. Fisher's two prior strikes involved stealing \$360 from his grandfather in 1986 and then robbing a pizza parlor of \$100. All told the take from Fisher's criminal career totals \$611 dollars; he has never physically harmed anyone.

How much will society pay to protect itself from this \$611 loss? On average it costs \$54,209 to build one prison bed space, and \$20,000-\$30,000 per year to house one prisoner. (The costs are higher if financing and related costs are factored in.) If Larry Fisher lives to be age 70, the total cost will be approximately one million dollars. Is society really getting its money's worth?

According to my reading of Initiative 593 neither the prosecutor nor the judge have any discretion in whether or not to seek or impose a third strike. The initiative drafters stated the purpose in making its sweep so broad was to ensure prosecutors could not plea bargain offenses down to avoid the law. Seattle Public Defender Dmitri Iglitzin states that no one is too sure what the statute means. PD's are concerned about the prosecutor agreeing not to seek a "third strike" in a plea bargain and then having the judge total up the defendants' criminal history and impose it anyway. The Seattle PD office is taking all potential third strike cases to trial. But from reading newspaper accounts of various 3 strikes cases in Washington it appears that in some counties the prosecutor is deciding whether or not to seek a "third strike" conviction separately from the underlying felony charge.

Using the Sentencing Commission's figures as a base to assume that 200 de-

fendants a year will be third—struck in Washington state alone, allows us to calculate a need for that many prison beds a year. Because they will never get out this will continue to grow; within ten years they will occupy at least 2,000 prison beds. The average prison in Washington holds about 800 prisoners. At the same time that Washington voters passed I-593 they passed I-601 which limited the ability of the legislature and governor to raise taxes. All tax increases are now tied to population growth and must be approved by voters. This will present something of a contradiction in coming years, voters want to lock everyone up for the rest of their lives but do they want to pay for it? More importantly, can they pay for it? Stagnant economic growth (itself a leading cause of crime) results in a smaller tax base for which to pay for more prisons.

There is a lot wrong with these 3 strikes laws. Aside from the fact that only poor people will bear their brunt there is the matter of proportionality. Everyone has heard the term "an eye for an eye". The original meaning of this was that punishment should be proportionate to the offense. If someone's cow wandered into your pasture this meant your village did not destroy the village of the cow's owner. Does stealing \$151 dollars merit life in prison? Is 50 cents worth 25 years?

There are already numerous laws which mandate life without parole for certain first time or repeat offenses. The Armed Career Criminal Act, passed in 1988, mandates 25 years without parole for a three time felon found in possession (not using, mind you, just possession) of a firearm. Michigan and the federal government also mandate life without for possession of more than 650 grams of heroin or cocaine for a first time offender. The only other offense in Washington state which carries a life without penalty is aggravated murder.

When the laws make no distinction in punishment between killing five people, having a gun, having 650 grams of drugs or stealing \$151 dollars there is something wrong. Washington and California police have reported that since the "3 strikes" laws went into effect suspects have become more violent in resisting arrest. A suspect knowing that if convicted for the \$151 dollar robbery he will spend his life in prison has, quite literally, nothing to lose if he has to kill a few people to avoid arrest. The result of this, I suspect, will eventually be broadening the death penalty. Seattle Police Sgt. Eric Barden was quoted in the *New York Times* saying "It now looks like some of these three strike cases might try to get away or shoot their way out. Believe me, that's not lost on us. We're thinking about it."

It is perverse logic where the proponents of these type of laws cite with approval the increasing numbers of people receiving such sentences, be it life without parole or the death penalty claiming they are a deterrent. If such laws were effective the numbers would decline. Neither the mainstream media nor the politicians have any interest in using logic or common sense in formulating public policy. All these laws will achieve are an increasing number of poor people in prison, more violence, more state repression and, eventually, greater use of the death penalty.

No laws will be passed making corruption by public officials, endangering public health by corporations, etc., a "3 strikes" offense (See William Greider's article in this issue). In 1989 the federal Sentencing Guidelines Commission was going to increase the penalties and punishment for corporations convicted of crimes, including making its executives criminally liable. Corporate America promptly lobbied the Commission and Congress and these amendments never

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materialized. Unfortunately, poor people affected by 3 strikes laws don't command a voice that Congress or the media will listen to. The rich get richer, the poor get prison.

Karl Marx wrote that history repeats itself, first as tragedy, then as farce. In 18th and 19th century England people were hanged for offenses like pick pocketing, poaching, etc. In this country many mandatory minimum sentences were repealed in the sixties and seventies as people realized they did not work and their only effect was to destroy what chances prisoners had to rebuild a life. Unfortunately, this repetition of history will not be farcical for those swept up by baseball slogans masquerading as social policy.

These three strikes laws give the impression that most defendants had a chance to hit the ball the first few times. In reality, by the time most defendants step into a courtroom for the first time they already have a couple of strikes against them: their class, alcohol and/or drug problems, illiteracy, joblessness, poverty and oftentimes their race or a history of abuse. They've been striking out a long time before they got up to the plate.

Assuming a 3 strikes defendant has been to prison twice before he gets his third strike it would seem that it's only fair to receive a decent chance to get a hit or a home-run. Instead, most prisoners go back to the same neighborhoods with the same poverty, joblessness, illiteracy and other problems with which they left-compounded by the brutalization and dehumanization inherent in the American prison experience of the 20th century. Right now legislators and DOC's are endeavoring to "make prisons tougher" by eliminating what token vocational and rehabilitational programs now exist. Combined with idleness, overcrowding, endemic violence, etc., a self fulfilling prophecy is being created: more third strikers. It's hard to get any wood on the ball under these conditions.

Will things get any better? Georgia's governor is proposing a "two strikes you're out." California governor Pete Wilson, hot on the heels of signing "3 strikes" into law declared that California needs a "one strike" law for child molesters, arsonists and rapists. He called for a mandatory death penalty for murders committed during drive-by shootings or carjackings. It won't be long now before they dispense with the wimpy one strike stuff and just go for the death penalty.

Why the Mighty GE Can't Strike Out

by William Greider

Led by Bill Clinton, the crime fighters of Washington have hit upon a wondrous new weapon for stomping on criminals: Three crimes of violence, from armed robbery and murder, the judicial remedy will be permanent. Lock 'em up for life — throw away the key. Leave aside all the reasons why this probably won't deter violent crime any more than the revival of the death penalty has discouraged homicides. The idea is so simple and direct — and so wildly popular — that only the bravest politician will dare question it. At both the state and federal levels, the principle is going to be enacted into law. Meanwhile, there is another variety of repeat offender who skips from one floric crime to the next and yet never encounters the same kind of angry reckoning. The crimes of these offenders are mainly about money — stealing public money — but some of the offenses can also endanger lives.

Let's name some of these recidivists: Boeing, General Electric, Grumman, Honeywell, Hughes Aircraft, Litton Industries, Magnavox, Martin Marietta, McDonnell Douglas, Northrop, Raytheon, Rockwell International, Teledyne, Texas Instruments, United Technologies.

All of these corporations are major defense contractors, and all have been caught defrauding the federal government in one way or another. And all of these companies have been nailed at least three times in recent years. Typically, they pay a fine or negotiate a settlement and promise not to do it again. The pattern of corporate crime is not restricted to defense contractors, of course, but they offer the most dramatic examples of a system that street criminals might reasonably describe as unequal justice.

GE seems almost in a criminal class by itself. At least, it gets caught more often than others. According to the Project on Government Oversight (the folks who first spotlighted the \$600 toilet seats that the Pentagon was buying in the '80s), GE has been involved in 16 different episodes of lawlessness — everything from false billings and weapons-procurement fraud to money laundering and bribery. Hughes Aircraft has nine strikes against it, and it's still at the plate. Grumman, Martin Marietta and Teledyne have each had five offenses against the taxpayers.

GE has pumped out more than \$130 million in fines and settlements to cover its various transgressions. Since 1986, the federal government has collected more than \$588 million under the False Claims Act from corporations that tried to chisel on contracts and got caught, usually because a whistle-blower on the inside went public. How widespread is such crime? A 10-year survey by a George Washington University professor found that two-thirds of the Fortune 500 were involved in one or more "significant illegalities." Seventy-five of the corporations were involved in five or more cases.

The three-strikes approach may or may not do much to frighten street hoodlums, but a similar approach to corporate crime would certainly put the squeeze on recidivist CEOs by hitting their bottom line. Ralph Nader has proposed that repeat companies that regularly defraud taxpayers be banned from selling to the government for a fixed period of time. The same principle could be extended further to cover the multitude of special tax breaks and subsidies made available to business: If you regularly break the law, you are not eligible to share in Uncle Sam's pork and gravy.

Let's not hold our breath waiting to see if this idea catches on in Washington. The same defense contractors who get nailed so regularly for fraud are currently lobbying Congress to weaken the False Claims Act, complaining that it's unfair to them. The message is clear: Muggers who wear suits should get an unlimited number of strikes.

Source: *Rolling Stone*, April 21, 1994.

Habeas Doesn't Bar § 1983

Ronald Rhodes is a Kansas state prisoner. He was placed in segregation by prison officials claiming he was planning an outbreak of racially motivated violence in the prison mess hall. He was never given written notice of the grounds for placing him in segregation. No written explanation of the threat posed or justification for the segregation were sent to the Secretary of Corrections as required by Kansas prison regulations.

Habeas (continued)

Rhodes filed a petition for a writ of habeas corpus in Kansas state court. The writ was eventually granted and the court ordered all references to the segregation expunged.

Rhodes then filed a suit under § 1983 for money damages claiming that his eighth and fourteenth amendment rights were violated by the segregation placement. After the state court granted Rhode's writ of habeas corpus the federal district court dismissed the 1983 action holding that it was barred by the doctrine of *res judicata*. The court of appeals for the tenth circuit reversed and remanded.

The court explains the doctrine of *res judicata* which prohibits the litigation of certain claims based on the resolution of an earlier action between the same parties. "Under *res judicata*, a final judgement on the merits of an action precludes the parties...from relitigating issues that were or could have been raised in that action."

The appeals court notes the fundamental differences between habeas and 1983 actions and the fact that the Supreme Court "has expressly sanctioned the practice of bringing a state proceeding for habeas corpus relief while simultaneously bringing a § 1983 action for damages in federal court, even when the claims arise out of the same set of facts." While habeas and 1983 actions can be joined by a plaintiff there is no requirement that they do so. Such a requirement would both increase litigation by litigants afraid to lose their claims for damages as well as impact on the prompt resolution of habeas corpus petitions. See: *Rhodes v. Hannigan*, 12 F.3d 989 (10th Cir. 1993).

Stun Gun Use Violates Constitution

J.B. Hickey was an Arkansas state prisoner in the Pulaski County jail awaiting transfer to the penitentiary. Jail officials ordered him to clean his cell and he refused. Jail deputies told Hickey they would shoot him with a stun gun unless he cleaned his cell. Hickey refused and was duly shot with the stun gun. After recovering from the shock he cleaned his cell. Hickey filed suit claiming that use of the stun gun constituted both summary punishment in violation of due process

and the wanton infliction of pain in violation of the eighth amendment. After an evidentiary hearing the district court ruled that the use of force was a lawful attempt to restore order in the jail and dismissed the suit. The court of appeals for the eighth circuit disagreed, ruled in Hickey's favor and remanded the case for a determination of damages.

The appeals court concluded that the lower court's determination that the stun gun was used to restore order in the jail was "clearly erroneous." The factual record showed that at no time did jail guards feel threatened by Hickey nor did they subdue, restrain or isolate him after he was paralyzed by the stun gun. "We can draw no other conclusion than that the stun gun was used on Hickey to cause enough pain and harm to force him to sweep his cell, and to make an example out of him."

The court discusses the use of summary force in detention facilities to restore order. The court held that the relevant factors used by courts to determine if force was lawfully applied are: whether force could have plausibly been thought necessary to maintain order in the institution and maintain the safety of prison staff and prisoners; the objective need for force; the relationship between the need for force and the force used; the threat to others reasonably perceived by the guards; efforts to temper the severity of the force used and the extent of pain or injury actually inflicted. "In this case we find there was no need for physical force to compel Hickey to sweep his cell. Hickey was not physically threatening the officers, nor was the stun gun applied for that reason. The relationship between the need for force (zero) and the force used (a painful and incapacitating shock) was excessive. And the pain inflicted was substantial."

Plainly put the court held: "The law does not authorize the day-to-day policing of prisons by stun gun." "There is no question that prison officials may compel compliance with legitimate prison regulations. A requirement that inmates sweep their cells is clearly a legitimate regulation. Nor do we dispute that circumstances may arise where prison officials are justified in using summary physical force. These three facts, however, simply do not translate into a mandate to use summary physical force to compel compliance with all legitimate rules."

The court lists numerous cases where courts upheld the use of summary force but noted that all the cases involved prison officials' concern for the safety of the institution and those within it.

"We find as a matter of law, that the use of a stun gun to enforce the order to sweep was both an exaggerated response to Hickey's misconduct and a summary corporal punishment that violated Hickey's Eighth Amendment right to be free of cruel and unusual punishment." See: *Hickey v. Seeder*, 12 F.3d 754 (8th Cir. 1993).

Infraction No Double Jeopardy Bar

Gene Newby and Raynaldo Barber were federal prisoners convicted in US District Court of assaulting and interfering with BOP guards. Prior to being criminally convicted they had been infraacted and found guilty, in a prison disciplinary hearing, of the same charges. As a result they lost good time, 1000 and 56 days, respectively.

In their criminal appeal Newby and Barber claim that under the double jeopardy clause of the constitution, the prison disciplinary hearing barred their subsequent criminal prosecution for the same charges. The court of appeals for the third circuit disagreed and upheld their convictions.

"Disciplinary sanctions imposed by prison authorities for infractions of prison regulations do not bar a subsequent criminal prosecution." Every circuit to consider this question, the 3rd, 8th and 10th, has reached the same conclusion. Thus, prisoners can be prosecuted before or after they have been found guilty of the same charges by prison tribunals.

The defendants also claimed the district court should have given them a downward departure from the sentencing guidelines because of the good-time they had lost in the disciplinary hearing. The appeals court held that the loss of good time is irrelevant for purposes of the federal sentencing guidelines because the former is administrative while the latter is a criminal function. See: *United States v. Newby*, 11 F.3d 1143 (3rd Cir. 1993).

Intake Center Prisoners Have Right of Access to Courts

After conviction and sentencing, Oregon prisoners are taken to the Oregon Corrections Intake Center (OCIC) which conducts an initial assessment and classifies the prisoner to the prison he/she will ultimately be sent. The average stay is between four to twelve weeks. The OCIC is jointly run by the Oregon DOC and Clackamas county.

Alvin Canell is an Oregon state prisoner. He alleges that while he was at the OCIC he had several legal claims pending in different courts but was not allowed access to a law library. The only means he had by which to conduct legal research was via a "paging system" whereby he would provide OCIC officials with the exact case citation he needed and they, in turn, would provide a copy of the case. Canell claims this was inadequate because he lacked the digests he would need to determine what cases he needed. He claimed that even when he did request a specific case it was not always provided and there were delays in the materials which were provided. He was also denied access to photocopying by which to copy his exhibits for service on the court and opposing counsel. He filed suit under § 1983 claiming that these denials violated his constitutional right of access to the courts. He also claimed he was denied dental care for a lost filling. Prison officials moved the court to dismiss the suit or grant them summary judgment. The court granted the motion in part, and denied it in part.

The state defendants claimed that the contract between the DOC and Clackamas county makes the county solely liable for the day to day operation of OCIC. The court rejected this contention by noting that every court to consider the issue has held that the party contracting services out to a third party remains liable when the third party violates a prisoner's rights. Because the final OCIC budget must be approved by the DOC they could have adjusted the budget to pay for more legal services.

The defendants claimed that the 'paging system' provides adequate access to the courts. The district court disagreed. "The paging system, also known as an 'exact cite system' because an inmate must request materials by exact cite, has been condemned by courts throughout the country." "Indeed, this court pre-

viously held the paging system unconstitutional when it was used at the Umatilla County jail... By 1993, no reasonable public official would have believed a paging system was by itself sufficient to protect an inmate's fundamental constitutional right of access to the courts." The court lists numerous cases dealing with the paging system, both for prisoners and pretrial detainees.

The court rejected the defendants' contention that no constitutional violation had occurred here because OCIC prisoners are only held at that prison for a short period of time. "The right of access to the courts is not limited to inmates serving long sentences at a state penitentiary. *Bounds* also reaches inmates temporarily housed at more transient institutions, such as a local city or county jail." The court held there was no excuse for not furnishing OCIC with a basic library or allowing prisoners to use the law library in the adjacent Clackamas county jail. One factor that influenced the court's decision is the fact that under Oregon state law prisoners have only 120 days in which to challenge guilty pleas.

The judge in this case noted he had a special concern with the defendant's claims because they had filed an expedited motion for summary judgment in another case in which Canell was suing the Clackamas county sheriff, knowing that Canell had no access to a law library in order to respond. The court noted that a jury could ascribe bad faith to the defendants' actions.

There is no "actual injury" requirement for prisoners claiming denial of basic materials needed for meaningful access to the courts. "'Injury' includes petitions not filed, allegations left out of the complaint, legal theories not pursued and cases not cited in the briefs that plaintiff did manage to file."

The court rejected the defendants' claim that there is no requirement that prisoners be provided with photocopying. The court held that while *Bounds* did not expressly mention photocopying, lower courts have recognized that photocopying can be an indispensable service when the prisoner-plaintiff must provide copies of exhibits and other original documents to the court and opposing counsel. Prisoners have a clearly established right to copying services whose denial must be treated as the equivalent of

any other *Bounds* claim for the denial of supplies or services which prison officials must provide to accommodate prisoner's right of access to the courts. "To prevail, plaintiff must demonstrate that he wanted to copy specific documents which could not be duplicated longhand, that those documents were to be filed with the court as part of a specific memorandum or other document, that he advised OCIC officials of this need and his request was denied either by or in accordance with a policy promulgated by the defendants, that those documents were relevant and necessary to the particular case and had to be omitted from the filing as a consequence of the refusal to provide photocopying services."

The court also rejected the defendants' contention that deferring dental treatment for prisoners until they are transferred is not unlawful. "Defendants argue that a missing filling is not a serious medical or dental need, and further assert that a delay in medical treatment does not constitute an eighth amendment violation unless the delay causes substantial harm. Defendants continue to labor under the fatal misconception that the Eighth Amendment duty to provide medical care is limited to conditions that are life-threatening or will cause permanent disability. In fact, the duty also applies to medical conditions that may result in pain and suffering which serve no legitimate penological purpose." The court held Canell had made a prima facie case that his eighth amendment rights had been violated by the denial of dental care. See: *Canell v. Bradshaw*, 840 F. Supp 1382 (D Or. 1993).

Fed Death Penalty Biased

In 1988 federal law was amended to allow for the execution of drug dealers who committed murder in the furtherance of their drug enterprises. Since the law came into effect the Justice Department has sought the death penalty in 37 cases. Of the 37 defendants 33, or 89%, just happen to be black or Hispanic. Of the six actually convicted and sentenced to die, three are black, one is Hispanic, and two are white. These figures were reported by congressman Don Edwards (D. Calif.)

who chairs the house judiciary committee. Before seeking the death penalty federal prosecutors must first obtain the approval of the attorney general.

Between 1930 and 1963, when the federal government last murdered someone with judicial sanction, 85% of its victims were white and 15% were black. Currently state death rows tend to be about 40% black, 58% white, 7.6% Hispanic and less than two percent Native and Asian Americans. Critics of the death penalty have long cited the racial disparity in how the death penalty is actually administered as one of the reasons to oppose it. Not surprisingly, this bias is showing itself in federal death penalty prosecutions as well. Statistics are not kept showing the wealth or poverty of those convicted to death but for the most part death row prisoners tend to be poor regardless of race.

At the end of 1992, the last year for which statistics are available, there were 2,575 prisoners under sentence of death in 34 states and the federal prison system. In 1992, 13 states executed 31 people. That more than doubled the 14 executed in 1991.

The Clinton administration is currently seeking to expand the federal death penalty. Because of this study Edwards is seeking an amendment to allow death row prisoners to use statistics to challenge their sentences as being racially biased and to be provided with competent counsel. The attorney general's office denied any racial bias in its use of the death penalty.

Amnesty International (AI), the human rights group, has called on Clinton to appoint a commission on executions, and halt them while the matter is being studied. In its letter to Clinton AI says there is ample evidence to show that death sentences are disproportionately imposed on the poor, minorities, retarded and mentally ill and on those without adequate legal counsel. Clinton has not yet responded to AI's letter. Given his past track record as governor of Arkansas where he never granted clemency to any death row prisoners and during his presidential campaign oversaw the murder of Ricky Ray Rector, a mentally retarded black man, it is unlikely he will do so.

Sources: *Seattle Times*, March 16, 1994 and *Corrections Digest*, Jan. 26, 1994.

Evidentiary Hearing Cannot Replace Trial In Beating Suit

Clifton Johnson is an Arkansas state prisoner. He filed suit under 42 U.S.C. § 1983 alleging that prison guards had beat, kicked and stomped him without provocation when he requested his property in the prison segregation unit. A magistrate held an evidentiary hearing at which prison guards claimed Johnson had been totally out of control and they used only the amount of force needed to restore order. The magistrate recommended dismissal of the suit, which the district judge did. The court of appeals for the 8th circuit reversed in part and remanded for further proceedings.

The appeal court ruled that, as a procedural matter, the magistrate had erred in recommending dismissal of Johnson's excessive force claim under 28 U.S.C. § 1915, the *in forma pauperis* statute. The IFP statute allows dismissal of legally or factually frivolous suits where the filing fees have not been paid. Because Johnson's claims were neither irrational nor incredible the suit was not appropriate for § 1915(d) dismissal.

While evidentiary hearings may be used to determine whether a *pro se* plaintiff's § 1983 lawsuit for damages warrants a jury trial, the hearing must be consistent with the plaintiff's right to a jury trial. The standard of review is "whether his case would survive a Fed.R.Civ.P. 50(a) motion for judgment as a matter of law at trial." The court must apply the proper standard of proof, avoid credibility determinations, believe the prisoner's evidence and draw all justifiable inferences in the prisoner's favor.

A jury trial was required to determine which party was telling the truth regarding the force used and the circumstances it was used in. See: *Johnson v. Midstate Justice Center*, 12 F.3d 133 (8th Cir. 1993).

Modification of Consent Decree Denied

In 1971 jail detainees of the Suffolk County Jail in Massachusetts filed suit concerning unconstitutional conditions at the jail. In 1979 the prisoners and sheriff entered into a consent decree which forbade the double-celling of jail prisoners. In 1989 a new jail was built and the sheriff sought to modify the consent decree to allow the double celling of detainees. The district court denied the request which was affirmed on appeal. The Supreme Court vacated the decision in *Rufo v. Inmates at the Suffolk County Jail*, 112 S.Ct. 748 (1992) and remanded the case back to the district court.

The sheriff again motioned for modification of the consent decree to allow double celling and the court again denied the request 148 F.R.D. 14. The court of appeals for the first circuit affirmed the denial. In its ruling the appeals court gave an extensive explanation of the legal standards used in modification of institutional reform consent decrees. The standard is a purely legal one subject to *de novo* review on appeal.

The court held that before a consent decree can be modified or vacated there must be a finding by the lower court that the underlying constitutional wrong has been remedied and that the authorities have complied with the decree in good faith for a reasonable period of time since it was entered. "Implicit in these requirements is the need for the district court, before terminating the decree entirely, to be satisfied that there is relatively little or no likelihood that the original constitutional violation will promptly be repeated when the decree is lifted." The court notes it would be a "travesty" of these requirements if a decree could be terminated in the face of substantial evidence that the same underlying violation would then be resumed.

The appeals court was not swayed by the argument that double-celling detainees does not violate the constitution. Noting that in this case the new jail was expressly built under the consent decree's terms of one detainee per cell, may eventually lead to a finding that double celling prisoners in those conditions would be unconstitutional due to an increased potential for assaults, disease, etc. Given the increased effort by prison and jail officials to terminate consent decrees that set population caps on detention facilities this is an important decision that holds state officials to their word. See: *Inmates of Suffolk County Jail v. Rufo*, 12 F.3d 286 (1st Cir. 1993).

Public Strip Searches Unlawful

Alvin Canell is an Oregon state prisoner held at the Oregon Corrections Intake Center (OCIC), which is jointly operated by the Oregon DOC and Clackamas County. Upon arriving, leaving or after any trip outside of OCIC, prisoners are made to disrobe, lift their genitals, bend over, spread their buttocks and cough. Those who refuse to do so are then forcibly searched by guards. Canell does not challenge the searches themselves but rather the manner in which they are conducted. He claims that the searches are conducted in an open area in full view of other guards, prisoners waiting to be searched, and clerical employees who view the strip searches through a window. Canell filed suit under § 1983 claiming that this type of search violated his Islamic religious beliefs. He filed for summary judgment and prison/jail officials sought qualified immunity, the district court denied both motions.

The court observes that: "Visual body cavity searches are dehumanizing and humiliating... Where permitted, such searches must be conducted in a reasonable manner and abuses cannot be condoned." The defendants conceded that gratuitous viewing by bystanders of naked prisoners is not supposed to occur but denied Canell's allegation that the searches had occurred in this manner. "Even assuming the viewings were inadvertent, a jury could find that the location and manner in which the search was conducted made such viewings inevitable, and the invasion of privacy was not offset by overriding penological justifications."

In denying the defendants' qualified immunity motion the court held that a reasonable prison official would have known that the conduct alleged in the complaint would violate a prisoner's constitutional rights. This finding was bolstered by the fact that there was evidence that the defendants were aware of this right because OCIC regulations cautioned employees to ensure booking office employees could not view the strip searches and instructed OCIC staff to maximize the privacy for the prisoners being searched.

The court disagreed with the defendants' contention that even if Canell's right to privacy was violated, that a single viewing is never actionable. "A single

viewing can state a claim if it is intentional and not motivated by any legitimate penological purposes... A single, isolated inadvertent viewing is probably not actionable unless the search was conducted in a manner that exhibited total disregard for the inmate's privacy rights." "That does not mean defendants are entitled to one 'free viewing' of each inmate... If an inmate had to show that he had been personally viewed on multiple occasions, then defendants could violate the rights of inmates with impunity because no one inmate would be viewed often enough to state a claim. Accordingly, repeated incidents of 'inadvertent' viewings of different prisoners can amount to a violation where prison officials fail to take reasonable steps to prevent such incidents at a *de minimis* cost to legitimate penological considerations."

Clackamas county moved for dismissal as a defendant claiming it was not involved in the violation of Canell's privacy rights.

The district court denied the motion noting that Clackamas county jointly operates the OCIC, assisted in its design and construction, has considerable input into procedures and policy at the OCIC and has a duty to implement those policies. See: *Canell v. Beyers*, 840 F. Supp 1378 (D Or. 1993).

NV Disciplinary Seg Rules Create Liberty Interest

Andrew Walker was a federal prisoner housed in the Nevada state prison system. During a cell search guards found a knife in Walker's cell. After the knife was found, Walker was placed in segregation. Prison officials claimed it was administrative segregation (ad seg), Walker contends he was placed in disciplinary segregation as punishment for the underlying offense. Several days later he was given written notice that he was charged with a disciplinary violation. Over a month later the hearing was held, without Walker being present, and he was found guilty of the charges. Walker filed suit under § 1983 claiming that prison officials had violated his due process rights by placing him in disciplinary segregation before his hearing; had violated his eighth amendment rights by failing to provide him with adequate clothing, ex-

ercise and medical care; and had discriminated against him by not providing him with sugar during his meals.

The district court granted summary judgment in favor of Walker on the procedural due process claims and awarded him \$800 in damages. The court granted summary judgment in favor of prison officials on all other issues. Both parties appealed and the court of appeals for the ninth circuit affirmed in part; reversed in part; vacated in part; and remanded for further proceedings.

The appeals court held that the Nevada Department of Prisons Code of Penal Discipline in effect at the time created a due process liberty interest for Nevada prisoners to remain free from arbitrary placement in disciplinary segregation. The court noted that Nevada provides more extensive due process protection than those mandated by the Supreme Court in *Wolff v. McDonnell*, 418 US 539, 94 S.Ct. 2963 (1974).

The ninth circuit adopted the reasoning of the first circuit in *Rogers v. Okin*, 738 F.2d 1 (1st Cir. 1984) which held: "if state procedures rise above the floor set by the due process clause, a state could fail to follow its own procedures yet still provide sufficient process to survive constitutional scrutiny." The court in this case ruled: "we need not consider whether the prison complied with its own regulations. Walker's right to due process was violated only if he was not provided with process sufficient to meet the *Wolff* standard." In other words, prison officials can have rules and regulations but are under no obligation to follow them.

The court held that a genuine issue of material fact was in dispute as to whether or not Walker had been denied the right to call witnesses at his disciplinary hearing. Walker contends he requested, and was denied, the opportunity to call witnesses at the hearing. Prison officials provided no explanation for denying his request.

The court affirmed dismissal of the eighth amendment claims because while denial of adequate clothing can violate the eighth amendment, in this case Walker did not indicate the clothes he did have and why that was insufficient.

In ruling on the defendant's cross appeal the court held that a genuine issue of material fact was in dispute as to whether Walker was held in administrative segregation or disciplinary segregation prior to his hearing. The award of damages was vacated until this issue was resolved. See: *Walker v. Sumner*, 14 F.3d 1415 (9th Cir. 1994).

No Court Review of Work Credit Denial

Daniel Waletzki is a federal prisoner. While imprisoned at the US Penitentiary in Terre Haute, Indiana, he worked in the kitchen. Prison officials refused to award him good time credits for meritorious job performance which would have reduced his sentence. The statute allowing such credits, 18 U.S.C. § 4162, has since been repealed and only applies to prisoners convicted before November 1, 1987. Claiming that other, similarly situated kitchen workers had been awarded their work credits, Waletzki challenged the work credit denial as being arbitrary and capricious by seeking habeas corpus review in the local district court. The court dismissed the petition which was affirmed by the seventh circuit court of appeals.

The appeals court held that while there is a habeas remedy for the denial of good time credits, that remedy is not available for work credits because there is no entitlement to work credits, they are awarded solely at the Attorney General's discretion. The court conceded the possibility that Waletzki had been denied his work credits in an arbitrary and capricious manner. Even then, he could not succeed on the merits of his claim.

Because the statute sets forth no guidelines or other limits on prison officials' discretion "It would not be feasible in these circumstances for a court to police the exercise of the prison officials' discretion. Of course if the decision to deny Waletzki good-time credits had been based on his religion or some other constitutionally forbidden criteria, we would intervene." With "no law to apply" there was no basis for judicial invalidation of administrative action. The court drew the analogy to employment discrimination claims where a court will decide if an employee was fired for an impermissible reason and not whether they shouldn't have been fired because they were doing a good job. "Evaluation of job performance is not a task that federal courts are well equipped to perform, especially when the job in question is in prison." See: *Waletzki v. Keohane*, 13 F.3d 1079 (7th Cir. 1994).

CO Affirms Right to Impartial Hearing Board

C. Frank Villa is a Colorado state prisoner. He was infracted for allegedly throwing food at a prison guard. At his disciplinary hearing Villa learned that the guard in question, who also issued the disciplinary report, had phoned one of the disciplinary board members to report the incident. Villa requested that the board member remove himself from the board so he could be called as a witness. The request was denied and Villa was found guilty. His administrative appeals denied, Villa sought review in Colorado state district court which dismissed it.

The Colorado state court of appeals reversed and remanded. In a brief opinion the court held that Colorado state prisoners have a right to call witnesses on their behalf at disciplinary hearings if the witness has knowledge relevant to a determination of the charges. Because the board member in this case did possess relevant knowledge Villa should have been allowed to elicit his testimony.

The court noted that prison disciplinary proceedings are a "quasi judicial proceeding which may be reviewed pursuant to C.R.C.P. 106(a)(4)... Such review is limited to a determination based upon evidence in the record, of whether the governmental body exercising a quasi-judicial function has exceeded its jurisdiction or abused its discretion." The appeals court remanded the case to the lower court with instructions to remand the case back to the prison disciplinary committee with instructions to conduct a new hearing. See: *Villa v. Gunter*, 862 P.2d 1033 (Colo. App 1993).

Law Students Entitled to Atty. Fees

Ten prisoners at the District of Columbia's prison in Lorton, VA, filed suit claiming they had been shackled, handcuffed and severely beaten by prison guards. They were then infracted, found guilty and placed in segregation without due process. Unable to afford counsel the prisoners retained counsel on a contingency basis. They were represented by a law firm, a solo practitioner, a law school professor, two law school graduates and law students who worked under the professor's supervision. The legal team did very well: they won a partial summary judgment and at trial won on all claims for all nine plaintiffs against the sixteen defendants. In a settlement pending appeal each of the prisoners received \$25,000.00 in compensatory damages. They then sought attorney fees.

The district court awarded the plaintiffs a total amount of \$341,737.25 for attorney fees litigating the merits in addition to \$21,380.00 for litigation involving the fee award. The district court gave an extensive explanation of the basis it uses to compute the market rates for which civil rights attorneys can be compensated. The defendants had argued that the plaintiff's lawyers should receive the allegedly lower rate paid to attorneys who handle civil rights and discrimination claims. The District of Columbia has a matrix system which determines fee awards for attorneys and the defendants did not provide evidence showing civil rights lawyers receive less than other attorneys performing similar work.

The court held that the law school professor, the graduate student,s as well as the law school students were entitled to attorney fees under 42 U.S.C. § 1988. The students in this case were not paid but were "retained" on a contingency fee basis. The court held that for fee award purposes a law school student hired on a contingency basis is no different than one hired for a salary. In this case the students received \$70 an hour for the 347 hours they spent on the case. The attorneys were compensated at a rate of \$260 an hour. See: *Covington v. District of Columbia*, 839 F. Supp 894 (DC DC 1993).

Readers interested in the issue of fee shifting under different civil rights statutes and the computation of market rates, etc., should see Judge Lamberth's accompanying rulings in non prison cases in the same volume of the F. Supp. The cases are: *Sexicus v. District of Columbia*, 839 F. Supp 919 (DC DC 1993) and *Brown v. Pro Football, Inc.* 839 F. Supp 905 (DC DC 1993).

Religious Freedom Restoration Act Passed

Congress has passed, and President Clinton has signed into law, the Religious Freedom Restoration Act of 1993, Public Law 103-141. The new statute was passed without an exemption for prisons and jails requested by law enforcement officials including the Attorney Generals of 26 states and the Association of State Correctional Administrators.

This important new legislation explicitly overturned the U.S. Supreme Court decision in *Employment Division v. Smith*, 494 US 872 (1990), which had held that facially neutral laws of general applicability that burden the exercise of religion require no special justification to satisfy the free exercise of religion clause of the first amendment, rejecting prior tests which required a compelling state interest and use of the "least restrictive means." Additionally, and of importance to prisoners, according to the Report of the U.S. Senate Committee on the Judiciary concerning the Act, Report No. 103-111, "As applied in the prison and jail context, the intent of the act is to restore the traditional protection afforded to inmates to observe their religions which was weakened by the decision in *O'Lone v. Estate of Shabazz*, 482 US 342 (1987).

Prior to *O'Lone*, courts used a balancing test in cases where a prisoner's free exercise of religion rights were arguably burdened by an institutional regulation: "only regulations based upon penological concerns of the 'highest order' could outweigh an inmate's claims." The Senate Judiciary Committee believed that *O'Lone* "weakened this standard, holding that prison rules that burden prisoners' religious practices satisfy the free exercise clause if they are 'reasonably related to legitimate penological interests.'" The intent of the Act, the Committee reported, "is to restore traditional protection afforded to prisoners' claims prior to *O'Lone*, not to impose a more rigorous standard than the one that was applied."

The general standard set forth in the Religious Freedom Restoration Act of 1993, which is applicable in jails and prisons, is that "government shall not substantially burden a person's exercise of religion even if the burden results from

a rule of general applicability, except" if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

The Judiciary Committee expressed its "expectation" that courts would "continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources," while warning that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements."

The Act creates the right to bring suit for violations of its standards and for prevailing plaintiffs to be awarded attorney fees. Prisoners contemplating the litigation of free exercise claims should consider bringing their claims under the Act rather than under the constitution given the higher degree of protection offered by the Act. Vol. 9, No. 1 of the *National Prison Project Journal* contains an excellent article by John Boston containing a lengthy analysis of the RFRA with a description of pre-*O'Lone* case law on prison free exercise claims and litigation strategy under the RFRA. Mr. Boston's article should be read by litigants before filing suit.

Source: *Jail and Prisoner Law Bulletin*, # 206. *NPP Journal*, Vol. 9, # 1.

UT Property Regs Create Liberty Interest

Jeffrey Abbot is a Utah state prisoner. He filed suit claiming his rights to due process were violated when he was transferred to administrative segregation (ad seg) and his personal property (books, bible, magazines, hygiene items, etc.) were confiscated. He also claimed that this amounted to cruel and unusual punishment in violation of the eighth amendment and violated his right to equal protection because conditions in ad seg were worse than those experienced by prisoners in disciplinary segregation. The dis-

trict court dismissed the suit as being "frivolous" under 28 U.S.C. § 1915(d), the *in forma pauperis* statute. The court of appeals for the tenth circuit affirmed in part, reversed in part and remanded.

Noting that the IFP statute allows a court to dismiss those claims which are legally or factually without foundation, the court affirmed dismissal of the equal protection and eighth amendment claims because they contained only conclusory allegations and no facts to show or describe any differences between ad seg and disciplinary segregation.

While prisoners have no right under the federal constitution to remain free from ad seg such a right can be created by the states. The court held that Utah has not created such a right because its ad seg rules are vague and do not substantially limit prison officials' discretion.

However, Utah regulation FDr 25/07.06(E) does create a liberty interest in Utah ad seg prisoners retaining minimal amounts of personal property. In this case Abbot contends that he was denied his bible because prison officials told him that he already had one book and ad seg prisoners could only retain one book. The above rule, however, allows ad seg prisoners to keep ten books and ten magazines and is a minimum which can be increased by the deputy warden. Despite grievances and requests, he was not permitted to receive the bible. The court held that the facts alleged were sufficient to state a claim for the denial of property without due process because Abbot was never given a hearing or allowed to contest the property seizure.

The appeals court held that the lower court had erred by relying on *Hudson v. Palmer*, 468 US 517, 104 S.Ct. 3194 (1984) to dismiss the property claims. *Hudson* dealt with a random, unauthorized deprivation of property. The court held that where prison officials take prisoner property pursuant to "an affirmatively established or *de facto* policy, procedure, or custom, the state has the power to control the deprivation" and must generally give the plaintiff a hearing. In this case the court held that the confiscation of his property could not be categorized as an unforeseeable, random property deprivation of the type addressed in *Hudson*. See: *Abbott v. McCotter*, 13 F.3d 1439 (10th Cir. 1994).



Guards Have Duty to Protect Prisoners

Oscar Williams is a Missouri state prisoner. He was assaulted and beaten by two other prisoners in his dormitory. The guard on duty at the time, Clarence Davis, witnessed the attack but did not intervene. When Williams attempted to escape his assailants Davis closed and locked the dormitory door which left Williams trapped with his attackers. Davis belatedly summoned assistance and when the additional guards arrived they halted the beating. Williams requested medical attention and an hour later a nurse cleaned his wounds and recommended he be taken to a hospital. Two or three hours later he was taken to a hospital and received treatment.

Williams filed suit claiming that his eighth amendment right to be free from cruel and unusual punishment was violated, first when Davis did nothing to halt the attack on him, secondly by the delay in receiving medical treatment. The case went to trial and at the conclusion of evidence the district court granted the defendants a directed verdict as a matter of law on all counts. The court of appeals for the eighth circuit affirmed in part, reversed in part and remanded.

The appeals court noted that prison staff have an obligation to protect prisoners from harm by other prisoners. An eighth amendment violation occurs when a plaintiff shows "defendants were deliberately indifferent to his constitutional rights, either because they actually intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates." "A prison official acts with deliberate indifference to an inmate's safety when the official is present at the time of an assault and fails to intervene or otherwise act to end the assault."

Listing cases where guard's failure to intervene in attacks was later held to be justified under the circumstances, the court concluded that in this case Davis presented no evidence or explanation as to why he failed to assist Williams. The district court also failed to explain the reason(s) it granted the defendant's motion thus depriving the appeals court of an opportunity to review the dismissal on its merits. This portion of the case was remanded for further proceedings. The appeals court upheld dismissal of the medical claims because Williams had presented no evidence to show that the warden was responsible for the delay in treatment. See: *Williams v. Weller*, 13 F.3d 1214 (8th Cir. 1994).

Riot at FCI Florence

Florence, CO, is the future site of the federal government's new supermax prison. Eventually Florence will have a minimum, medium, maximum and supermax prison within one big complex. The minimum and medium sections are already opened and operational. *PLN* has reported on the control unit aspect of Florence in the past.

At about 7:30 PM on February 26, 1994, prisoners began to riot in the outdoor recreation area and it spread to the indoor recreation, education, chapel and living units. One guard and an undisclosed number of prisoners suffered minor injuries during the melee. The prison suffered fire, smoke and water damage but BOP officials did not provide a dollar estimate on the damage. The medium security prison was originally designed to hold 700 to 800 prisoners but currently holds 1,200. It opened in January of 1993.

The February 28, 1994, article from the *Cañon City Daily Record* did not cite the causes or reasons behind the riot. However, a separate article in the February 27, 1994, issue of the *Rocky Mountain News* stated that the BOP was already investigating mismanagement and unrest at FCI Florence. Nineteen staff members and supervisors signed a petition asking Senator Ben Nighthorse to investigate racial discrimination, harassment and unfair labor practices against staff at the prison. Four prison supervisors, three of them black, have been placed on indefinite suspension for allegedly challenging decisions by the prison warden.

The suspended supervisors claim that due to mismanagement prisoners have: stolen hand tools left by landscapers working at the prison and fashioned them into weapons; organized and carried out two hunger strikes and a work strike; set fires in segregation and housing units and refused to allow guards to handcuff two prisoners after a beating between gangs. The prison spokesperson claimed to have no knowledge of any of these events.

Hog-tying Violates 8th Amendment

Eugene Littlewind is a North Dakota state prisoner. In 1988 Littlewind and three other prisoners attacked a guard in the North Dakota Penitentiary segregation unit. After the attack, Littlewind cooperated with guards and was taken to the prison's observation unit. Once there he was stripped naked, placed face down, his hands were handcuffed, his feet shackled and a chain run between the two resulting in his spine being arched. This lasted for almost eight hours during which the restraints were removed only for a 40 minute meal break. Unable to use any bathroom facilities during this period, Littlewind was forced to urinate on the bunk. For the next 23 hours Littlewind was handcuffed with the handcuffs chained to one leg, after which he spent an additional seven and a half days in handcuffs and leg irons within the cell. During this period he was kept naked, without a blanket, toothbrush, toothpaste, toilet paper, in a cell lit 24 hours a day. This occurred with no medical supervision and with the water to his toilet disconnected. Littlewind filed suit under § 1983 claiming that this treatment violated his eighth amendment right to be free from cruel and unusual punishment.

The case went to trial and the jury found in favor of the defendants on all counts. Littlewind then filed a Motion for Judgment as a Matter of Law and/or Motion for a New Trial, which the district court granted. Judgment as a matter of law under Fed.R.Civ.P. 50 requires that the court consider the evidence in the light most favorable to the party who prevailed with the jury. The jury verdict must be supported by substantial evidence. In this case the court held that the jury's verdict went completely against the weight of the evidence.

The defendants had testified at trial that they had restrained Littlewind solely as an emergency safety measure and not to punish him. The court held this was not borne out by the evidence at trial. The defendants pointed to cases which allowed prisoners to be restrained in their cells, denied clothes, bedding, etc. The court rejected this argument because it "...ignores the crucial distinction that

plaintiff in the case at bar was subjected to all of these deprivations simultaneously." Thus, the totality of the circumstances must be considered in finding the eighth amendment violation even if each action alone would not violate the eighth amendment.

The court found that Littlewind was subjected to the above treatment as punishment for attacking the guard. "The chaining of an inmate in this manner and deprivation of every human necessity without provocation was so barbaric and inhumane that it could only have been done maliciously and sadistically for the very purpose of causing harm, and must be considered cruel and unusual punishment as a matter of law." The court discusses numerous cases where prisoner's conditions of confinement were found to violate the eighth amendment.

"Not only did all the evidence show that the initial conditions of plaintiff's confinement were indefensible, but it demonstrated that the strained and protracted circumstances of plaintiff's confinement also contributed to the violation of his constitutional rights." Littlewind was cooperative during and after his period in segregation which undercut the defendants' security claims.

The court also found the defendants' security claims were undermined by the fact that all four of the prisoners involved in the attack were treated the same and were placed in lesser restraints when brought to court for the attack and then more forcibly restrained once back in the prison segregation unit. Based on the evidence at trial, the court concluded that no legally sufficient evidentiary basis existed for the jury to have ruled in the defendants' favor. See: *Littlewind v. Rays*, 839 F. Supp 1369 (ND 1993).

Rape Victim States Claim

James Johnson is a Connecticut state prisoner. He filed suit against various prison officials claiming they were deliberately indifferent to his physical safety after he was placed in a cell with a prisoner who had a known history of sexual assaults who raped him. He claimed prison officials then failed to take action upon his complaints of other prisoners' sexual advances, threats and assaults against him, denied his request for protec-

tive custody and that they had failed to enact and enforce policies to prevent the occurrence of such assaults. The defendants responded by filing a motion to dismiss on several grounds. The district court granted the motion to dismiss in part and denied it in part.

While noting that the eleventh amendment bars suits against state officials in their official capacities for money damages, suits seeking injunctive relief are allowed by the eleventh amendment. Suits against government officials in their individual or personal capacities may seek money damages.

The court denied the motion to dismiss for failure to state a claim upon which relief could be granted. It is well established that prisoners have a right to be protected from attack, rape and assault by their fellow prisoners. Prison officials' failure to do so may result in an eighth amendment violation. The court lists numerous cases from various circuits dealing with this issue. Because the law is so well established the defendants would not be entitled to qualified immunity from suit or money damages on this issue. See: *Johnson v. Meachs*, 839 F. Supp 953 (D Conn 1993).

ISR Seg Conditions Suit Not Frivolous

Twelve prisoners in the segregation unit of the Indiana State Reformatory (ISR) filed suit challenging their conditions of confinement. They claimed that their right to freely practice their religious faith was violated when they were denied access to religious programs; their right of access to the courts was violated when they were only allowed three hours of access per week to the prison law library and that their confinement in administrative segregation (ad seg) violated their right to due process. The district court dismissed their suit as being frivolous under 28 U.S.C. § 1915(d). The court of appeals for the seventh circuit vacated and remanded.

Byron Alston was the only one of the original twelve plaintiffs to appeal dismissal of the suit, the appellate court held the other plaintiffs were thus barred from benefiting from their ruling. The court discusses the *in forma pauperis* statute which allows courts to dismiss actions

lacking an arguable basis in law or fact. The court noted that courts must give the pleadings of *pro se* litigants a liberal reading and should provide an opportunity to amend a complaint if more specific factual pleadings will cure its deficiencies.

The record before the lower court was devoid of any evidence concerning ISR practices on ad seg religious programming and the need for the restrictions imposed on the plaintiffs. "Absent such evidence, the district court had no basis to conclude that the limitations on Alston's First Amendment rights were reasonable. The court's assumption that the defendants were justified in restricting Alston's religious freedom simply because he was in administrative segregation was improper." Thus, Alston should have been given an opportunity to amend his complaint to explain how he was denied worship services and the circumstances surrounding the denial, the lower court erred in dismissing the claim.

Because the key question in suits claiming a deprivation of access to the courts is whether the prisoners were given "meaningful" access, the lower court erred in dismissing the access claims where the prisoners claimed the amount of time allotted for law library access was inadequate. Prison officials bear the burden of proving the adequacy of the means provided. "The district court also erred in concluding Alston's failure to allege a general or specific detriment warranted the dismissal of his access to the courts claim under § 1915(d)." Especially when a plaintiff alleges denial of access to adequate legal materials or legal advice the court must give the plaintiff an opportunity to particularize his lack of access to claim to include a showing of injury.

Noting that prisoners have no right under the federal constitution to not be placed in administrative segregation the question is whether such a liberty interest has been created by state law. The court notes that "Whether Indiana law grants Alston a protected liberty interest in mingling with the general population is undecided." Because the seventh circuit has yet to rule on this question Alston's claim that he was denied due process when he was placed in ad seg and kept there, the claim is not frivolous and requires further factual development. The appeals court remanded all three claims back to the lower court for further proceedings. See: *Alston v. DeBruyn*, 13 F.3d 1036 (7th Cir. 1994).

AK Disciplinary Hearing Violates Due Process

Richard Brandon is an Alaska state prisoner. During a search of his cell prison guards found homemade liquor and a stolen radio. Brandon was infracted and found guilty at a disciplinary hearing and his administrative appeals were denied. Brandon filed an appeal with the state superior court which denied it, refused to stay the punishment pending further appeal and awarded the state \$293.72 in partial attorney's fees and costs. The Alaska state supreme court vacated and remanded holding that prison officials had violated Brandon's right to due process at the hearing and the lower court had applied the wrong standard in declining to stay the punishment.

The supreme court held that Brandon was denied due process when the disciplinary hearings officer refused to call the guard who searched his cell as a witness. The court notes that under the Alaska state constitution prisoners have a fundamental right to call witnesses at their disciplinary hearings. "The burden is on the hearing officer to state reasons why the accused is not permitted to call the witness." "We have stated that it is the 'exceptional case' where the chairman should refuse to call a witness." Alaska readers should note that this is a much different standard than that of the US Constitution in *Wolff v. McDonnell*, 418 US 539, 94 S.Ct. 2963 (1974) which gives prison officials greater discretion in denying prisoners' witnesses.

Because it granted Brandon relief on the denial of his witnesses the court did not address his claim that the disciplinary committee violated his due process rights by not making findings of fact upon which it based its "guilty" verdict. But it did note the committee's failure to follow the express requirements of Alaska Administrative Code which requires a written statement of the facts relied upon to make its ruling.

The court held that the lower court had applied the incorrect standard in denying Brandon's petition to stay the imposition of punishment pending his appeal. The fact that Brandon would be irreparably harmed if the stay was lifted was what the court should have considered, not the state's argument that he had little likelihood of success on the merits. The supreme court vacated the award of attorney fees. The court affirmed dismissal of other issues raised by Brandon. See: *Brandon v. Department of Corrections*, 865 P.2d 87 (Alaska 1993).

UNICOR Sued For Illegal Sales

Joe Mohwish, a federal prisoner at FCI Jesup in Georgia, has filed suit against UNICOR claiming that they are competing against private industry by selling prisoner made clothing to private companies. UNICOR is prohibited by statute from competing against private industry and cannot sell its products to nongovernment agencies. UNICOR is owned by the US government and operated by the Department of Justice and Bureau of Prisons.

The clothes in question were sold to Sport Europa, a Miami based clothes retailer. Prisoners are paid between 23 cents and \$1.15 an hour for their labor. UNICOR makes everything from furniture to military components, See May, 1994, *PLN*.

Mohwish and Duane Olson, another Jesup prisoner, have filed suit in US District Court in Georgia alleging that the practice violates the RICO (Racketeering Influenced and Corrupt Organizations) act, its own 1934 charter and other laws. The suit also alleges that UNICOR is the largest employer of illegal aliens in the US, employing over 4,500 in violation of federal laws which prohibit the knowing employment of undocumented aliens. The inspector general of the Department of Justice has also begun a preliminary investigation into the allegations of falsified records and improper sales.

The suit has received widespread attention in the local Georgia media. *PLN* will report on developments as they occur. Readers interested in further information should send \$10.00 to cover postage and copying costs to: Media Project, P.O. Box 920474, Norcross, GA. 30092. (404) 449-5419. They can provide copies of the complaint, exhibits, preliminary motions and rulings and news clippings from the local media.

\$35,000 Awarded for Beating

Leon Davis is a Georgia state prisoner. He filed suit claiming that his eighth amendment right to be free from cruel and unusual punishment was violated when a guard shoved him down the stairs of a fire escape and another guard punched him in the face and struck his legs with a baton while he was handcuffed. The events occurred as Davis and other prisoners were evacuated from their living units at the Rivers Correctional Institution after rioting. After a bench trial, the district court held the prison guards had beaten Davis without cause and awarded Davis \$10,000 in compensatory damages and \$25,000 in punitive damages.

Noting that eighth amendment claims have both a subjective and objective component, the court held Davis had satisfied both elements in proving his claim. The objective prong is met by showing the deprivation was serious. In this case Davis suffered substantial pain from falling down the stairs, the fall permanently damaged two discs in his back requiring surgery. The subjective prong is met by showing that prison or jail officials acted with a particular state of mind, i.e. wantonly. The particular state of mind, intentional or malicious, depends on the basis of the claim, deliberate indifference for medical claims, maliciousness for excessive force claims.

Analyzing the guard's actions under *Hudson v. McMillian*, 112 S.Ct. 995 (1992) the court held that the guards did not act with a good faith motive to restore discipline. "Defendant presented no evidence of the need to use force whatsoever, much less the amount of force needed to shove a man down a flight of metal stairs. The court finds that Moss' actions were motivated by malice and ill will toward inmate Davis."

The court declined to award damages for lost earning capacity caused by the injury because Davis had no work history nor had ever attempted to find work. However, Davis was entitled to \$10,000 to compensate him for his pain and suffering. The court awarded punitive damages in the amount of \$25,000. "The imposition of punitive damages are necessary to deter Moss and other correctional officials from using unnecessary and malicious force against inmates." The court also authorized an award of attorney's fees. See: *Davis v. Moss*, 841 F. Supp 1193 (MD GA 1994).

IL Bans Prisoner Name Changes

The Illinois legislature recently passed Public Act 88-25, effective July 6, 1993, which prohibits convicted felons from changing their names while incarcerated. The act also prohibits felons from changing their names until two years after being paroled or pardoned.

Anthony Bogan is a *PLN* reader in Illinois who has sought to change his name to Yakubu Mapfumo. He is prohibited from doing so as a result of the above law. He has filed a petition for a name change which was denied by the district court. The appeal is now pending and the appeals court has declined to appoint counsel. Both the ACLU and NAACP have declined to provide legal assistance in challenging the statute's constitutionality. Bogan is requesting legal assistance from counsel. He can be contacted at: Anthony Bogan # N13398, P.O. Box 711, Menard, IL. 622S9.

No Miranda Rights in Prison

PLN does not normally report on criminal cases, however, that line is sometimes blurry and we will report on cases which will affect or interest our readers. Marco Garcia was a prisoner in the Hillsborough County Jail in Florida. He was observed by jail guard Robert Gardener feeding a fire in his cell with stuffing from his mattress and other objects. Gardner directed Garcia to leave the cell and extinguished the fire. After putting out the fire Gardner asked Garcia why he had set the fire. Garcia responded "I no get my canteen... I got my rights." Not only did Garcia not get his canteen, he also did not receive a *Miranda* warning that his statements to Gardner could be used against him in a criminal proceeding.

Garcia was charged and convicted in Florida state court of first degree arson. His statements to Gardner were introduced at the trial, over his objection, and were an important part of the state's case. He sought federal habeas corpus relief by claiming his fifth amendment right against self incrimination was violated

when Gardner interrogated him about the fire without informing him that his reply could be used against him in court. The district court denied relief and the court of appeals for the eleventh circuit affirmed.

The sole issue on appeal was whether *Miranda v. Arizona*, 384 US 436, 86 S.Ct. 1602 (1966) required that Gardner inform Garcia of his constitutional rights before asking him why he started the fire. In *Mathis v. United States*, 391 US 1, 88 S.Ct. 1503 (1968) the supreme court extended *Miranda* to prisoners. In this case the eleventh circuit followed the ninth and fourth circuits to conclude that a persons' status as a prisoner does not automatically constitute "in custody" for *Miranda* purposes.

The court held that *Miranda* warnings are not required anytime prison officials question a prisoner. To succeed on such a claim the prisoner/petitioner must show that official's actions placed further limitations on them than those already imposed by the prison. To determine if prison officials have applied further restraint, courts must consider the totality of circumstances surrounding the interrogation. In this case Gardner's actions imposed no further restraints on Garcia than those he was already subjected to. Indeed, the court held that by leaving his cell he was actually given greater freedom. See: *Garcia v. Singletary*, 13 F.3d 1487 (11th Cir. 1994).

DOJ Seeks More Money for Prisons

On February 7, 1994, President Clinton submitted his proposed budget for fiscal year 1995 to congress. The Department of Justice (DOJ) is slated to receive \$13.652 billion, a \$2.679 billion increase over the 1994 budget. This figure includes \$2.423 billion that the administration is seeking from a Crime Control Fund, part of the "anti-crime" legislation now pending before congress.

Included in the DOJ budget request is \$450 million to activate 9,673 new prison beds and pay for increased operational costs of existing facilities. It also requests \$83 million for construction of 4,224 beds and the leasing of private prisons. This breaks down to: \$101 million to activate prisons in Beckley, WV; Coleman, FL; Butner, NC; Waseca, MN;

medical facilities in Carswell AFB, TX and Ft. Devens, MA; a detention center in Oklahoma City; detention units at FCI Sheridan, OR, and FCI Seagoville, TX; and a housing expansion in FCI Stafford, AZ. These activations add up to 9,673 beds, which represent more than a 10 percent increase in Bureau of Prisons (BOP) bed space.

The \$83 million will go to build new prisons, with the 4,224 beds, in Louisiana, Texas and California and leasing a facility in Oklahoma. There will be an increase of \$28 million to cover the costs of projected increases in the average daily BOP population to 92,677 in 1995. This increase will provide funds to put more prisoners into existing prisons. A \$16 million increase will be spent on contracting out for secure bed space to private companies. These funds will be used to support an increase in the Community Corrections Population, provide housing for the Mariel Cubans, fund federal prisoners housed in state prisons and local jails, and help manage a joint FPS/INS contract facility in Eloy, AZ. \$57 million will fund the costs associated with an expected 500,000 additional jail days in 1995. This is a 10 percent increase over 1994.

Source: *Corrections Digest*, Feb. 9, 1994

ABC Benefit Tape

The Anarchist Black Cross (ABC) consists of local groups around the world who seek to assist political and politically active prisoners. This includes sending reading materials, organizing for the abolition of prisons, campaigns to expose frame ups, injustices against specific prisoners and more.

As a fund raiser several bands in England donated songs to make a benefit tape to help the ABC. The tape is 60 minutes long and features songs by Robinson, Flat Cap Conspiracy, Blind Mole Rat, The Mysterious Fifth Member, Gentle Ichor's Devotion, The Heather Dawson Experience, The Obi Men, Chom', Steve Finn, The Amazing Oak Tree Band, Vodi, Pastel Collision, The Acab Posse and Academy 23. The styles range from punk to industrial.

Copies of the tape are available for only \$7.00 each, postage paid. Send orders to: ABC, Box 8, 1 Newton St. Manchester, M1 1HW, England.

Prison Labor And The Need For Representation

By H. Rosenberg

The 1993 session of the Washington State Legislature, passed a bill into law, mandating that Washington State DOC double the size of the Institutional Industries program within the next several years. The bill in essence creates more higher paying jobs for prisoners. To some this might sound good, but do not be fooled, the last thing on the State's agenda is to provide meaningful employment that might provide for a nice nest egg for prisoners upon release. They were responding to a notion that has become fashionable as of late, and that is: Make those scumbag prisoners pay for their room and board!

In careful analysis this is Capitalism doing what it does best—the rich profiteering off the work and misery of others, with no concern for those who are performing the labor. The courts have long held that prisoners in no way enjoy the same rights as other workers. The truth of the matter is slave labor is alive and well in the prisons of America, as well as the rest of the world. If a prisoner does not “program,” i.e. work, he/she can lose good time, be thrown in the hole, not be allowed to live in the better housing units, and in other unique ways pay for not going along with the “program.” In some prisons they have school that can count as “programming,” but the majority of prisoners in all main line prisons work institutional jobs. The majority of these jobs, are either in the kitchen, laundry, or are in the living units where the work is janitorial in nature. The prisoners in Washington are paid between 20 and 38 cents for this their labor, which makes it impossible to save any money for one's release.

There are also a handful of “Industry” jobs, where outside contractors manufacture items like clothing, concrete products, or furniture, all in sweatshop like conditions. The majority of these “Industries” would in no way be competitive in the real world. But with the substandard working conditions, lack of safety provisions, slave wages, and not having to pay health, or other benefits, they are able to turn a profit.

Someone might argue that the prisoners that are working these “Industry” jobs in many cases earn minimum wage, and the prisoners are learning a trade. Both of these are weak points when scru-

tinized. Yes, some prisoners do make minimum wage, but after the usual taxes are taken out, the State takes out more money for “Room and Board,” court costs and fines, and what ever is left over is put in a “Trust” account. All of this is at the expense of the prisoner worker being exploited in such a manner that makes us the lowest of all human classes, that of the slave class. As for these “Industry” jobs preparing us for a job on the streets, the training that is offered would at best qualify us for nothing but the most menial of tasks, and any job on the street that the prisoner worker could get, would ensure the prisoner of a lifetime of poverty. So the benefit of these jobs are little if any for the prisoner, and the benefit to the Powers that Be is that of huge financial gain.

So the writing is on the wall, prisoners will be expected to work under the most unsafe, and harshest of conditions. We will not enjoy any of the most basic worker rights, and we will be aiding our captors keep the jack boot firmly in place, right on our throats.

What can we do about this? The answer is Representation, or in other words Organize! The greatest fear of the Prisoncrats is a Prisoner Union, and their fear is rational. For if we act with unity to improve the conditions under which we work and live, we will be successful, and that success would spell the end of the strangle hold they have on all of us. For those of you who are aware of how the Powers that Be feel about Prisoner Unions, what I am suggesting is tantamount to war. But I am not talking violence, I am talking Education, and Organization. We must completely change the way we think, we must think of what is good for us all, and not what we can gain for ourselves individually. We must not look at our fellow Prisoners and see an enemy because he/she is not the same race, we must not look at the sex offender and see a rapist, or child molester, we must not look at the weak, and see him/her as our next victim. What we should see in other prisoners is what they are, victims of a cold and calculating system, and potential brothers, and sisters in the Struggle. There is one prisoner who we should see as threat to us all, and that is the informant. Again I am not advocating violence, but I do advocate ostracizing them because they are a threat to any prisoner

right movement. We ostracize them by not eating with them, if they sit at our table, we move, no threats just move. We do not talk to them, we do not recognize them, they just become non-people.

What I am calling for when I speak of a Prisoner Union, will be fought tooth and nail by the prisoncrats, those who are found to be organizers, will draw time in the hole, and be transferred, liberation is not for the weak of heart. But if a we unite in great numbers, they cannot punish us all, if we stay true to ourselves, we will prevail.

Such a union can not just be a local organization, it must be global. We must form networks of supporters on the streets, as well as in the prisons. We must not be violent, for to do so will justify the use of force against us. The power of the worker strike will be our greatest tool, this hits them where they live, and that is in their wallets.

PRISONER UNION AGENDA

1. Minimum wage for all prisoner workers.
2. The right to organize without retaliation.
3. The right to collective bargaining.
4. The right to a safe work place, with proper safety equipment, clothing, and extensive training on dangerous machines that prisoners operate.
5. Overtime pay for any time over forty hours worked in a one week period.
6. One week paid vacation a year.
7. Workman's compensation benefits that are the same as free workers who are hurt on the job.
8. Elimination of tying job performance to earned good time.
9. Never have more than 50 percent of a prisoners pay deducted for taxes, trust accounts, or room and board.
10. The creation of hiring practices that insures for racial fairness, and that the same job programs are available in women's prisons as in mens.
11. And above all the right to strike over any working condition

The above is only a rough outline. In this day and age of “three strikes you're out,” something needs to be done before matters get worse than they are.

PRISONER WORKERS OF THE WORLD UNITE!

Rico Expanded By Supreme Court

by Ray Luc Levasseur

On January 24, 1994 the U.S. Supreme Court unanimously ruled that the Racketeering Influenced Corrupt Organizations (RICO) law does not require proof of economic motive, *National Organization of Women, et. al. v. Joseph Scheidler, et. al.* The court's decision clears the way for NOW to continue its RICO civil suit in the lower courts.

NOW, a liberal feminist organization, was joined and supported in its petition to the court by the U.S. Department of Justice. Besides Scheidler, the targets of the suit include numerous anti-abortion organizations, with Operation Rescue being the most prominent. The NOW suit alleges that Operation Rescue, etc. are trying to shut down health clinics that provide reproductive services to women, including safe, legal abortion, and that their tactics include blockades, threats, etc. to dissuade women from using these clinics. What interest the Justice Dept. has in this case can only be presumed, but it's doubtful that their motivation has much to do with assisting NOW in their struggle to protect women's access to abortion clinics.

The narrow legal issue decided by the court was whether RICO requires proof that a group is motivated by an economic purpose—as many district and appellate courts have held. The U.S. Supreme Court ruled that RICO requires no economic motive.

No economic motive in a law designed to prosecute organized crime, racketeering and corruption? How RICO arrived at this point, and the implications of such a ruling merit closer examination.

RICO came on line in 1970 as a law enforcement tool designed to be used against organized crime. It's stated purpose was to combat the infiltration of "legitimate" business by organized crime. Federal courts quickly expanded the meaning and mandate of RICO, and broadened police powers. For example, in *Turkette*, no allegation of organized crime need be established. Any union or group of individuals—any "association in fact"—will do. In RICO terminology this is referred to as an "enterprise."

Key elements of RICO are that individuals be engaged in a "pattern of racketeering", and that they conduct or participate—directly or indirectly—in an en-

terprise through a pattern of racketeering activity. Only two acts are necessary to establish a pattern. A racketeering act is defined as any act or threat indictable under 50 or so state and federal laws (e.g. obstruction of justice, interference with commerce, arson, etc.). The U.S. Congress has and surely will continue to amend this law to include other acts indictable under RICO.

There are two RICO criminal laws: (1) Participation in a Racketeering Enterprise, with its requisite two acts, and (2) Racketeering Conspiracy. RICO's conspiracy provision casts a much broader net as an individual need not be involved in the commission of the alleged acts. It is proof enough that you engaged in a "conspiracy" to do so. Conspiracy is not limited to a formal agreement. It can be established by a wide range of circumstantial evidence and be as subtle as a nod of the head.

The stakes are high. Each RICO count carries a maximum 20 years imprisonment as well as fines.

Civil remedy is the focus of the NOW v. Operation Rescue case. NOW initiated a RICO civil suit. Who can litigate such a suit? (1) Anyone who claims injury in business or property as a result of a RICO violation. (2) The U.S. Department of Justice. (3) Any U.S. District Court. Also important to note is that RICO civil action comes with enormous subpoena powers to compel testimony and seize documents. The court can issue injunctions against the target of the suit.

And, at the court's discretion, the court can order RICO civil proceedings closed to the public. Within this Star Chamber the standard of proof required of a civil action is considerably less than that found in criminal proceedings.

The potential pot of gold for the successful plaintiff is enormous because RICO provides for monetary awards of *triple* the amount of damages claimed.

It's been a long time coming, but we're now hearing some of the liberal left making noises about the potential abuse inherent in the ever-expanding RICO laws. The *Nation* editorialized against this latest expansion. The *Progressive* states RICO is dangerous. Anti-nukers and campus activists worry that they may be next. They are concerned that next time

they stop business as usual at a military facility, campus building, government agency, or factory gate, they may be subjected to the full prosecution of the RICO laws. The concern is that a political or economic boycott, or militant occupation and picket lines will be defined as a pattern of racketeering. Think about the legendary Rosa Parks and the Montgomery bus boycott. Such "prohibited activity" would certainly come under the shadow of RICO, had it existed then. And Rosa Parks would have had lots of co-defendants because RICO focuses on the prosecution of groups rather than on the individual.

In the NOW case, judge Souter filed a concurring but separate opinion warning, "I think it prudent to notice that RICO actions could deter protected advocacy...." Recently a *New York Times* op-ed piece hailed the court's decision as "a decisive new weapon against terrorism." Be forewarned.

These aren't the first warnings. In 1987 the FBI issued a statement of intent to apply RICO to "terrorist" activity. Prosecutorial guidelines issued by the Department of Justice stated that RICO establish that a group have an "economic or other identifiable goal." For the purpose of establishing an "enterprise", it merely must have "a common shared purpose." In the early 80's the government initiated its first RICO prosecution against a political group—right wing Croations. In 1994 the first RICO civil suit against a political group is against the right wing Operation Rescue, etc. It didn't and won't remain this way.

After prosecuting the Croations, the government did a 180 degree political turn and began prosecuting leftists: twenty-eight in 3 cases ("Brinks"; New York 8+; Ohio 7+). I was a defendant in one of these trials where we were charged with membership in a revolutionary organization and participation in acts—directly or indirectly—"to further our political goals."

The indictment alleged certain "manner and means" used to further the goals of the criminal "enterprise." Among them: (1) Procured and carried false identification. (2) Used a network of apartments and homes ("safehouses"). (3) Used mail drops and telephones to avoid detection. (4) Practice in the use of fire-

arms. (5) Conducted meetings to discuss the purpose of the enterprise.

These are not illegal, per se, but constitute the web like components of a RICO Conspiracy.

Those targeted throughout these trials (and the parallel grand jury investigations) repeatedly warned of the dangerous political precedent being enforced through RICO. If they come for us in the middle of the night, they'll come for you some fine morning or afternoon. We were largely ignored by those engaged in passive resistance, boycotts, and publishing.

The so-called strict constructionists of the Supreme Court apply a very narrow interpretation of the Constitution when it comes to the rights of the oppressed. Business and property interests come first, along with the expanded police powers to protect those interests. The U.S. Department of Justice doesn't prosecute crime and corruption at the highest levels of government—where it is most pervasive. They didn't use RICO against Oliver North and the Iran-Contra "enterprise" (the very word used by North to describe the network of war criminals masquerading as patriots). They don't RICO prosecute corporations that destroy limbs and lungs of workers, or police departments that brutalize and kill.

NOW's RICO suit demonstrates the natural fault line of liberalism when it becomes overly dependent on the law, courts, and government enforcement. Allied with government prosecutors, NOW stands to gain something in the short run, but it comes with steep and protracted political costs. Virtually every progressive and radical group in the country—if its activity merits more than a few parking tickets—is now a standing target for a RICO civil suit. You can be sure the government didn't join NOW in its suit to conduct a broad search and destroy mission against the right wing. They are undoubtedly using this case as a whetting stone to hone the edge of their broad sword of RICO.

It took liberals and litigation to snatch a victory being won in the streets by pro-choice activists, and turn it into a loser for the entire left. Just as there's no such thing as being "a little bit pregnant", there is no expanding the scope of RICO "a little bit" without increasing the potential for future political repression.

From the Editor

By Paul Wright

Welcome to another issue of *PLN*. We received a lot of letters from readers inquiring about the late delivery of their March, April and May issues. That was due to delays in the desktop publishing which delayed the March issue. The move to the east coast also compounded this as we had to get new postal permits which took a little longer than expected. Our move to the east coast has been finalized and all the problems associated with lining up an inexpensive printer, postal permits and volunteers appear to be resolved. Readers complained about the low quality of the March and April issues so we have switched to a new printer who has better quality control and is still cheaper than Seattle area printers.

With this issue of *PLN* we should be back on schedule of getting each issue into the mail by the end of the preceeding month. Thank you for bearing with us on this transition. Now for the good news. Last month's issue of *PLN* had 20 pages as a special anniversary issue. It turns out that it costs us a little less to print a 20 page issue of *PLN* in New York than it cost us to print a 16 page issue in Seattle. We have a large backlog of material so we are taking advantage of this to increase *PLN*'s size to 20 pages. So there is more of us to read. We rely on reader's financial support to publish and basically, the more money we get the more magazine you get. So please encourage others to subscribe and if you can afford a little extra as a donation please donate generously, about a third of our readership is in long term control units or death row and unable to donate at all.

With this issue we will be sending out large numbers of *PLN* to public defenders and attorneys. We would like to increase our readership among the legal community. By establishing a base of institutional subscribers we can do more outreach to prisoners and their family members who are not conveniently listed in any directories. With the growing prison population it is also important that the legal community be aware of what is happening both in prisons and the court challenges to prison conditions.

We frequently get letters from readers with inquiries. If you write and expect an answer please include an SASE, postage or stamped card, this cuts down on our postage costs and makes a reply easier. If you missed an issue of *PLN* due to a move or transfer please send a few stamps to cover the postage if you want a replacement. The post office charges us between 35 and 52 cents for each issue it returns. Because we mail via third class mail the post office does not forward copies. So keep us posted of any address changes 30 to 60 days in advance if possible.

PLN is also seeking a new, used or refurbished 386 or higher computer and monitor in order to assist in various *PLN* related tasks. If any reader has, or knows someone who has one available for donation please contact me. Any donations of this type are tax deductible for those who pay taxes.

Enjoy this issue of *PLN* and share it with others. Please let others know about us and encourage them to subscribe. Remember that we can send you bulk copies of *PLN* for distribution to potential readers, at events, gatherings, etc.

Repression Ohio Style

By John Perotti

On April 14, 1994, the 60th day of a hungerstrike by Danny Cahill (see *PLN*, April, 1994), state representatives Rhine McLin and Samuel Bateman ordered Lebanon Correctional Institution officials to take them to Danny's isolation cell. Danny had been experiencing daily vomiting and convulsions; his cell reeked of vomit. Lebanon prisoncrats had refused to recognize Danny's protest or medically monitor his strike, contrary to department rules.

Representative McLin promised to launch an investigation into the misuse and falsified charges of "gang related activity" used to repress prison activists and jailhouse lawyers and ordered the Lebanon physician to place Danny on a liquid diet. The original charges stemmed from Lebanon investigator Flick monitoring mail between myself, my companion Sharon, Chryztof Knecht, Bill Martin and Danny which were formulating

tactics of legitimate legislative lobbying letters and flyers protesting the implementation of a supermax prison in Ohio, as well as support activities for our class action lawsuit against Ohio's governor and DORC challenging overcrowding in Ohio along with the reduced programs and conditions resulting from the overcrowding. The suit encompasses six different maximum and close security Ohio prisons and has eleven named plaintiffs.

In effect, Danny was charged with being a "gang leader" due to his being a plaintiff in *Knecht et al. v. Voinavitch, et al.* Case number C-1-94-12 (SD OH) (Judge Spiegel). Justice Watch issued press releases and we expressed our respect and solidarity with them for their support. Danny is still held in isolation, recovering from the strike.

Any Ohio prisoners charged with a Class II R31 as a pretext to retaliate for legitimate constitutionally protected activities should write to State Representative McLin advising her of the situation. We give our thanks to State Representatives McLin and Bateman for their conscientious involvement and intervention in the blatant abuse of power against Danny by Lebanon prisoncrats.

The retaliation I've been subjected to, besides the usual withholding and opening of legal and regular mail, denial of a visit from an 84 year old nun confined to a wheelchair, and the everyday verbal harassment, was to issue a reversal of the two set up infractions that placed me in administrative control (AC) then issue a reversal of the reversal that was supposed to let me out!

In response to a legal pleading where I informed the court that I had yet to receive a ruling on my administrative appeal, 72 months after the tickets that placed me in AC (appeals are supposed to be heard within 30 days), Cheryle Jorgenson, staff attorney for the DORC, issued a "Decision of Director on Disciplinary Appeal 94-37" stating that there was no record of the RIB proceeding, and since none exists, to either rehear the case or expunge it from my record. This was dated March 17, 1994.

When I argued to MANCI officials that it would be a further constitutional violation to rehear a 72 month old case, and that I should be released to general population with the infractions expunged, they balked. On March 28, 1994, the sixth circuit court of appeals affirmed dismissal of a major retaliation suit in

which I was a plaintiff, ruling for the prisoncrats. On March 29, 1994, MANCI training officer R. Plaster called me out to the office and informed me that he was going to call Cheryle Jorgenson and tell her he had "located" the records of the RIB proceeding and would make them available to her. This was done because they no longer had to defend against the previous suit which had them red handed.

Being the age old veteran of ending up on the short end of the stick when it comes to the state, I foresaw the events to come and hurriedly prepared and filed a Writ of Habeas Corpus in the county court. MANCI is located in, seeking enforcement of the reversal and asking for release into the general population. This was filed on April 7, 1994. Sure enough, Cheryle Jorgenson, writing for DORC Director Wilkenson issued a "Supplemental Decision of the Director on Disciplinary Appeal 94-37" dated, you guessed it, April 7, 1994, stating that the missing/non-existent records of the RIB proceeding "evidently" had been misfiled or misplaced at central office and now had been "discovered" and, upon review they now affirm the RIB findings and reverse the previous decision reversing the guilty finding.

In a further attempt to moot my petition for habeas relief I was transferred to the infamous Southern Ohio Correctional Facility in Lucasville. Upon my arrival here I was met by Captain Brown, whom I had won a \$2,000 judgment against after he sprayed me in the face with a fire extinguisher and beat me while I was handcuffed and shackled. After winning that suit I was transferred from SOCF to a one man control unit range at the Lebanon Correctional Facility before being sent to Mansfield. It appears I've come full circle.

To carry on Danny Cahill's tradition of peaceful protest, I have followed his lead and began a hungerstrike on May 3, 1994, to protest my being kept in AC for this "reversal of the reversal" of the infractions that placed me in AC to begin with as well as my retaliatory transfer to SOCF. I ask that all the readers of this article write state representative Rhine McLin, with a copy to Director Reginald Wilkenson, calling for a full investigation into this glaring example of retaliation, and his justification for waiting 72 months to hear my administrative appeal, when regulations demand that he do so within 30 days, then issue an order reversing the case, only to "reverse his rever-

sal" after he became victorious in the previous suit when the 6th circuit court of appeals affirmed the dismissal, and the same day I filed for a writ of habeas corpus demanding release based on the reversal. I ask that you demand my release back to general population and expunge the infractions, just as he ordered in his first reversal of March 17, 1994.

It is important that all of us send a message to the state legislators and our representatives exposing the obvious retaliation and repression for our legitimate utilization of the democratic process they supposedly base our United States constitution and government on. When peaceful and legitimate process is denied, what does that leave us? Remember Attica, remember Santa Fe, remember Lucasville!

John Perotti. # 167712
P.O. Box 45699
Lucasville, OH. 45699-0001

Write:

In Re "Decision of Director on Disciplinary Appeal 94-37", John Perotti
167712 SOCF release from AC.

TO:

State Representative Rhine McLin
16 E. Broad St. 9th Fl. Rm. 901
Columbus, OH. 43216
Reginald Wilkenson
Director, DORC
1050 Freeway Drive N.
Columbus, OH. 43226

A Call To Reason

By Pat O'Connell

The recent news about an ex-murderer being promoted to assistant sheriff of the San Francisco Sheriff's department shouldn't really be such a unique news item but the story got me to thinking about why it would make headlines.

Michael Marcum murdered his father in 1965 and spent seven years in prison before beginning his career as a civilian administrator of San Francisco's jail system, a successful career spanning almost 20 years which has earned him the respect of his supervisors as well as his latest promotion to assistant sheriff.

Good thing for Mr. Marcum he did not wait until after 1978 to commit a murder. Our first and second degree murder sentences are now 25 years to life and 15 years to life, respectively. The parole board appointed by Governor Wilson paroled an ex-cop who donated \$30,000 to

A Call To Reason (continued)

Wilson's campaign fund, yet others who have done 8, 10, 12, 14 or more years for the same crime as Mr. Marcum are being denied parole despite statistics which show the vast majority of murderers over the age of 40 who have served 8 or more years in prison never again commit a violent crime, despite their obvious self-rehabilitation, despite their support in the community and their matured attitudes and behavior which come with middle age. If Mr. Marcum had waited until after 1978 to kill his father, he would still be sitting in prison, unless perhaps he could afford a substantial contribution to Governor Wilson's campaign fund.

Assistant Sheriff Michael Marcum's story is news, I guess, because we hear so much about the nationwide trend of building more prisons and giving longer prison sentences. But Mr. Marcum's story is just another good example of why we do not need more prisons and longer prison sentences. In California alone, thousands of Mr. Marcums are needlessly still in prison when they could be with their families, being good citizens and contributing to the economy rather than wasting more years in prison while their families also suffer and we taxpayers foot the multi-billion dollar prison costs. All the Mr. Marcums have shown us that a one-time, isolated violent incident is not a pattern and that after seven years of punishment in the cruel prison environment a matured parolee can reenter the community as a law abiding citizen, even a successful career professional.

So what went wrong? The politicians have used disinformation campaigns through the media to promote themselves and do favors for the prison employee unions that have contributed to their campaign funds. The prison employees get pay increases and job promotions when more prisons are built, so of course they want longer sentences and more prisons.

What happened to psychologists and sociologists being on the parole board? Governor Wilson has appointed ex-politicians the public would not elect and gave them the cushy \$80,000 a year jobs because they are members of his political party. So Wilson directs his parole board not to release any prisoners and come election time they will all say "See: we're tough on crime. We didn't let any dangerous criminals out of prison and, in fact,

we want to make the sentences longer and build more prisons because we're concerned about your safety.

You won't hear Wilson or any of his chums tell you about the Mr. Marcums. If there are as many Mr. and Ms. Marcums out there as I think there are, the public has just as much right to know about them as it does the rare sensationalized exception to the rule which the media has been too quick to point out and which the self serving politicians have used as the weak foundation for their argument for more prisons and longer prison sentences. Mr. Marcum showed us that more prisons and longer prison sentences are not necessary. If we are to spend more billions, let us spend it on the causes of crime. Let's be reasonable about all this.

Court Allows Video Commitment Hearing

Leroy Baker is a federal prisoner who was scheduled for a hearing to determine if he would be committed to a mental health facility. While there is nothing unusual about such hearings, this one was conducted by means of "teleconferencing" whereby Baker and his attorney remained at the federal prison in Butner, NC, while the judge and prosecutor remained in the courtroom in Raleigh, NC. Such video conferences were recently approved in the march, 1993, Judicial Conference. This appears to be the first time the technology was used, and challenged.

Citing the cost and inconvenience of sending federal marshalls to Butner to pick up prisoners and bring them to court for their competency hearings, the court approved the government's motion to conduct the commitment via teleconference. Other concerns expressed by the court were the disruption in prisoners' medication schedules and having to place mentally ill prisoners in holding cells with healthy prisoners. The court describes the arrangement whereby the witnesses, Baker, and others were present at Butner and televised into the court some forty miles away.

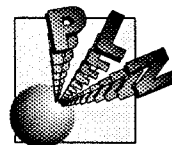
Bakers's attorney objected to the arrangement on the grounds that it denied Baker due process and the right to effective assistance of counsel and rights guar-

anteed by 18 U.S.C. § 4247(d). Specifically, that Baker's absence from the courtroom deprived the judge of the opportunity to observe his demeanor as a participant in the hearing and as a witness, and brought into play a host of psychological and behavioral factors that were potentially prejudicial to him. The court disagreed.

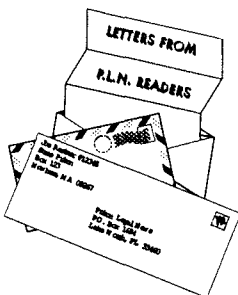
Noting that commitment hearings are civil proceedings which do not entitle defendants to a full range of rights as criminal proceedings do, it does cause a significant impairment of federal liberty interests and implicates important individual rights. The court concluded that the government has a strong interest in minimizing its travel and security costs by conducting commitment hearings by video. This interest outweighs a prisoner's interest in an in-person hearing.

The court notes that some cases will still require in-person commitment hearings, such as where a prisoner suffers from an illness that features obsessions with televisions, recording equipment and other forms of electronic communication. "The court concludes that the teleconferencing at issue here is not only constitutional but also is effective and must be explored. That the federal judicial system and the services it provides are expensive is no secret. Teleconferencing could, if properly developed and implemented, not only curtail costs and save time for counsel and other court and prison personnel, but also-more importantly-be safer and provide other benefits for inmates who otherwise would face a day of transport, strange surroundings, and disrupted medication. The system is viable, and it does not infringe on rights guaranteed to respondent under the Constitution and Laws of the United States."

It is likely that prisoner litigants, especially those proceeding *Pro Se*, will encounter this type of teleconferencing in the future. It seems to offer greater convenience and ease for matters such as pre-trial hearings and such now normally conducted by telephone. Prisoner litigants facing long trips to court for non-trial matters may be interested in petitioning the court for a teleconference instead. See: *United States v. Baker*, 836 F. Supp 1237 (ED NC 1993).



Reader Mail



Computerless in Alaska

It was with intense interest that I read your editorial in the February, 1994, issue in which you described the end of your 5 year struggle to get your computers back for in-cell use. I am sorry to tell you, our struggle has only recently begun.

I am a prisoner at the Spring Creek Correctional center in Seward, Alaska. We have a population of about 450 prisoners here, maximum security. At one point we were allowed computers and printers for in-cell use. However, in January, 1992, we were blessed with a new warden, you guessed it, Larry Kincheloe, and his first action here was to take away our computers and printers. Of course, he had a little help from the Alaska Attorney General's office in this scheme to hinder our access to the courts and deny our rehabilitative efforts. We now have approximately four cases pending in federal district court in Alaska on this issue and are only near or at the discovery stage of the litigation.

We are currently experiencing the most blatant forms of harassment and retaliatory measures by this prison administration (headed by Larry Kincheloe) due to our exercising our right of access to the courts. The state and federal courts in Alaska have recently been flooded with prisoner civil rights actions, mainly due to actions by Larry Kincheloe.

W.C. Seward, AK.

[Editor's Note: Larry Kincheloe was formerly the warden of the Washington State Penitentiary at Walla Walla, where he banned prisoners from possessing hand held calculators, among many other things. As soon as he was promoted to Director of the Division of Prisons in 1989, one of his first actions was to initiate a statewide ban on in-cell computer use, limit memory typewriters, etc. The

computer ban was only overturned by a new Director after Mr. Kincheloe left for the warden job in Alaska.]

Needs Counsel For Association Claim

I am litigating *Kalka v. Henry*, number 93-4595 filed in US district court in the Central District of California. The case asserts that prisoners have the right to form organizations to work towards change of their sentences and for change of the various drug laws, that is to say, for the legalization of all drugs, as an extension of their sixth amendment rights as well as by virtue of their first amendment rights. It claims that these sort of organizations are distinguishable from unions, which can be prohibited as a result of *Jones v. North Carolina Prisoners Union*. It claims that there are no legitimate penological causes for prison officials to ban such organizations.

The BOP has stopped the formation of such groups at FCI El Reno, FDC Pleasanton, FCI Terminal Island, and elsewhere. It has prevented fund raising for FAMM and other groups working against current public policy.

After being transferred to FCI Tucson I requested that the warden here allow the organization in question. He, expectedly, denied the request. However, as the case moved forward through the courts, the warden requested clarifications of my proposal. He finally authorized that the organization be allowed to function. At this point it is difficult to say whether the BOP is making a system wide statement or if it is the aberration of one warden.

This is a very important issue. We are a disenfranchised minority. The only way America's 400,000 drug violators can be heard is to galvanize the support of their families and their friends. There are millions of those and they are not making their numbers felt.

If any PLN readers are interested in this issue I would ask them to contact me. They may do so directly or through my attorney: Christopher Cannon, 600 Harrison St. Suite 535, San Francisco, CA. 94107. People can stay in contact with me through Mothers Against Illegalization of Drugs (MAID), P.O. Box 4289, Irvine, CA. 92716. This is an excellent group working for legalization and discussion of the policy realities of today.

My problem is finding representation in the suit. I am pro se in a class action suit and I shouldn't be. This is too major an issue. I have moved for appointment of counsel and the court hasn't responded yet. It would be far better to have dedicated and competent counsel come into the case at this juncture. Any assistance or ideas in that regard would be highly appreciated.

Ben Kalka # 84449-011
FCI Tucson,
8901 S. Wilmot Rd.
Tucson, AZ. 85706-9700

ATT Billing Info Wanted

I am writing to find out if you know of any other friends or families of prisoners who have had false charges by ATT on their phone bills. I paid for about \$150 worth of bogus collect calls from a friend in the York, NE prison before I looked closely and found the calls were placed at times when she was unable to place such calls. ATT has insisted she did place the calls (even when she was physically locked in her cell and the phones are ordered turned off at 9 PM) and has refused to give me credit.

I would appreciate hearing from any other readers experiencing this problem. The more people who expose this practice by ATT, the more likely we are to have our money refunded to us. We have to pay or lose our phone service, so we have no choice.

Nancy North
333 Argo Ave.
San Antonio, TX. 78209

AZ Prison Blues

In Arizona prisoners are allowed a TV, stereo, typewriter, fan, electric razor, reading lamp and a hot pot. Yet the Director of Prisons claims that it is the hot pots which use the most electricity thus he is banning hot pots! He also wants to start using the Activities and Recreation fund for purposes other than those which were the intent of the legislature. In taking the hot pots, the director is also discontinuing all items on the prison store which are used in conjunction with the hot pots.

The director, Samuel Lewis, has a complete disregard for society. Lewis ordered district warden Crist to open a new prison unit before it was completed, by this I mean placing prisoners in a unit

when the security fence was not even completed! This is a medium security unit. Warden Crist objected to placing prisoners on an unsecured yard, citing the possible dangers to society. Lewis informed Crist he didn't care about his objections and Crist then resigned. Lewis then ordered Deputy Warden McFadden to open the new unit (Eyman Complex, Meadows Unit, Florence, AZ) and the unit was opened. When the unit was first opened the main gate was not in place, I mean the fence just ended with a space for the gate which was wide open, the prisoners were forced to eat meals sitting on the visitation room floor as the chow hall was unfinished, there was no law library for two months and construction continued on every phase.

B.S. Florence, AZ

[Editor's Note: With his letter this reader sent a memo dated January 31, 1994, issued by AZ DOC Director Lewis. In the memo Lewis states the DOC will use recreation funds to pay for the replacement or repair of any state property damaged through intentional activities or neglect by prisoners. Medical costs associated with personal injuries inflicted by prisoners on each other will also be paid for from the fund. In addition to discontinuing hot pots Lewis states that the DOC will introduce legislation to charge prisoners a nominal fee for the use of electrical appliances. He will also seek to charge prisoners for routine medical expenses. In a memo, later rescinded, Lewis also banned all publications with a sexual theme, i.e. Playboy, Penthouse, Playgirl, Hustler, Fox, etc.]

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Supreme Court Defines "Deliberate Indifference" in Prison Rape Case

The US Supreme Court heard only one prison related case in its 1994 term, and it resulted in a win for the prisoner. In *Farmer v. Brennan* the court was asked to answer what constitutes "deliberate indifference" to a prisoner's safety. The case involves Dee Farmer, a transsexual federal prisoner. Before being incarcerated, at age 18 in 1986, Farmer took female hormones, received breast implants and underwent an unsuccessful testicle removal surgery. Farmer is feminine in appearance.

In 1989 Farmer was subjected to a disciplinary transfer from the Federal Correctional Institution (FCI) in Oxford, WI to the United States Penitentiary

(USP) at Terre Haute, Indiana. The latter is a maximum security prison. Within two weeks of being placed in the USP's general population Farmer was beaten and raped at knife-point by her cellmate. Several days after reporting the incidents Farmer was placed in segregation. Farmer is also HIV positive. At no time before the rape did Farmer request protective custody from prison officials or voice any concerns about her safety.

Farmer filed suit against Bureau of Prisons (BOP) officials at Oxford and Terre Haute. Farmer claimed that the BOP officials either transferred her to the USP or placed her in the general population despite knowledge that the penitentiary had a violent history and a history of prisoner assaults and despite knowledge that Farmer, as a transsexual with feminine characteristics, would be particularly vulnerable to sexual assault by some of the USP prisoners. These actions, according to the complaint, amounted to deliberate indifference to Farmer's safety and thus, resulted in a violation of her eighth amendment rights.

The district court dismissed the complaint ruling that the failure of prison officials to prevent prisoner assaults or rapes violates the eighth amendment only if prison officials were reckless in a criminal sense, meaning that they had actual knowledge of a potential danger. In ruling for the BOP defendants the district court emphasized the fact that they lacked the requisite knowledge of any potential danger to Farmer because she did not request protection or express concern for her safety. The court of appeals for the seventh circuit summarily affirmed without opinion. The supreme court reversed and remanded.

The supreme court granted certiorari in order to resolve a conflict between the

circuits over what constitutes "deliberate indifference" by prison officials. Compare *McGill v. Duckworth*, 944 F.2d 344, 348 (CA 7, 1991) which held that "deliberate indifference" requires a "subjective standard of recklessness" with *Young v. Quinlan*, 960 F.2d 351, 360-61 (CA 3, 1992) "A prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate."

In its unanimous opinion, by Justice Souter, the court gave a history of the evolution of the deliberate indifference standard, which was first applied to prisoner medical claims in 1976. The court rejected applying an objective standard of indifference, which would be easier for prisoners to prove on summary judgment or at trial, and instead opted for a subjective test. "We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."

The court emphasized that before any finding of liability under the eighth amendment can be made, the trial court must focus on what the defendant's mental attitude was at the time of the violation. The court notes that eighth amendment suits are still civil actions and thus a finding of subjective intent in the criminal sense is not appropriate and "a court should no more allude to the criminal law when enforcing the Cruel and Unusual Punishments Clause than when applying the Free Speech and Press Clauses, where we have also adopted a subjective approach to reck-

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Deliberate Indifference (continued)

lessness." "That said, subjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment."

The court rejected Farmer's argument that without an objective test for deliberate indifference prison officials would be free to ignore obvious dangers to prisoners. "Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.... We doubt that a subjective approach will present prison officials with any serious motivation to 'take refuge in the zone between 'ignorance of obvious risks' and 'actual knowledge of risks.'"

Prisoner plaintiffs will be able to show prison officials' requisite knowledge of the substantial risk, which is a question of fact, in the usual manner such questions are proven, including inferences from circumstantial evidence: "...a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." As an example the court cites a theoretical plaintiff who shows he was at risk for attack which was longstanding, documented, pervasive or expressly noted by prison officials so that under the circumstances it could be inferred that the officials being sued had been exposed to information concerning the risk and "must have known" about it, "then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."

Prison officials cannot "escape liability for deliberate indifference by claiming that, while aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. The question under the eighth amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health,'... and it matters not whether the risk comes from a single source or multiple sources,

any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk... If, for example, prison officials were aware that inmate 'rape was so common and uncontrolled that some potential victims dared not sleep but instead... would leave their beds and spend the night clinging to the bars nearest the guards' station...' it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom."

Of special interest to those litigating prison reform cases for injunctive relief, the court notes that plaintiffs need not await for an actual rape or assault to occur before they can petition a court for injunctive relief to change or modify prison conditions. "An inmate seeking an injunction on the ground that there is 'a contemporary violation of a nature likely to continue,'... must adequately plead such a violation; to survive summary judgment, he must come forward with evidence from which it can be inferred that the defendant-officials were at the time the suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future. In so doing, the inmate may rely, in the district court's discretion, on developments that postdate the pleadings and pretrial motions; as the defendants may rely on such developments to establish that the inmate is not entitled to an injunction." A court finding the subjective and objective components of an eighth amendment violation is free to issue an injunction to remedy the complained of conditions. The court advises prisoners to seek resolution of their complaints

within the prison systems, administrative remedies before filing suit because that is usually quicker than the judicial process.

Under this legal backdrop the court remanded the case back to the district court to allow Farmer to conduct discovery and to reconsider its ruling based on this opinion, namely that an eighth amendment violation can be proven without the prisoner giving advance notice or warning to prison officials that he/she is at risk of assault.

Justice Blackmun issued a concurring opinion which criticized the standard of "deliberate indifference" used by the court since *Wilson v. Seiter*, 501 US 294 (1991) which requires a culpable state of mind by prison officials before an eighth amendment violation can be found. Such a standard ignores objectively brutal or inhumane prison conditions resulting from legislatures failing to fund prisons and such. Blackmun urges the court to overrule *Wilson*. In a concurring opinion, Justice Clarence Thomas reiterates his belief that the eighth amendment does not apply to prison conditions, only to sentences imposed by courts. See: *Farmer v. Brennan*, Case Number 92-7247, 62 Law Week 4446, June 7, 1994.

[Editor's Note: Stop Prisoner Rape is a non profit organization which filed an amicus curiae brief in this case which gave an excellent view of the problem that rape constitutes in the American prison system. They have copies of the amicus brief which is aimed at seeking injunctive relief for the betterment of prison conditions and which the Supreme Court appears to have relied on in this case; available for \$3.00 unbound and \$6.00 bound. They also offer referrals to attorneys willing to handle prison rape suits and a legal committee with advice, expert witnesses, etc. for attorneys and prisoners already litigating prison rape cases. SPR can be contacted at: P.O. Box 2713, Manhattanville Station, New York NY. 10027-8817. (212) 666-0344/663-5562.]

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Lockdown May Be Unconstitutional

Danny Eason is a Texas state prisoner. After two disturbances, in which he was not involved, the prison he was housed in was locked down for a total of 25 days. He claimed that during this period he was denied access to the prison law library and was only served pork in violation of his Muslim religious beliefs. The district court dismissed the suit as being "frivolous" under 28 U.S.C. § 1915(d), the *In Forma Pauperis* statute. The court of appeals, in a brief ruling, vacated and remanded for further proceedings.

"Even though a lockdown rarely will require more than informal review, some process arguably was due Eason and, given the limited information before us, we cannot determine whether it was provided."

While denial of law library access can be justified for a short time, especially in the wake of a prison riot, a prisoner pursuing a legal action who requires law library access and has all access denied may state a cognizable claim. Likewise, "prison officials have a constitutional obligation to provide reasonably adequate food and, absent some legitimate penological interest preventing the accommodation of a prisoner's religious restrictions, food which is anathema to an inmate because of his religion is at least arguably inadequate." Thus, the lower court had erred by dismissing the suit. See: *Eason v. Whaler*, 14 F.3d 8 (5th Cir. 1994).

NM Visitors May Refuse Searches

Diane Castro is married to a New Mexico state prisoner. Prison officials received an anonymous telephone call stating that Castro was smuggling drugs to her husband at the Southern New Mexico Correctional Facility (SNMCF). Upon her next visit Castro was taken to a conference room and asked by the deputy warden and captain to submit to a strip search. Castro initially refused and the officials stated they would contact state police to obtain a search warrant. After further detention Castro surrendered two baggies of marijuana and was then strip searched. Charged in state court with at-

tempting to smuggle drugs into a correctional facility, she pleaded guilty but appealed the lower court's denial of her suppression motion. The New Mexico state court of appeals held that prison officials lacked reasonable suspicion to search Castro and the evidence should have been suppressed.

In its ruling the court followed every federal appellate court to consider this question by holding that prison officials must have reasonable suspicion before they can strip search a prison visitor. The court then went further and held "even when reasonable suspicion is present the visitor must be afforded the opportunity to refuse to be searched and be escorted off the premises."

"If the demands of the prison environment are to justify a lesser standard-the reasonable suspicion standard-for strip searches of visitors, the lesser standard can be justified only to the extent necessary. If the objectives of the search-the prevention of the introduction of weapons or contraband into the prison environment-can be accomplished by less intrusive means, those means should be required of prison officials when they are a reasonable alternative to a search. In our view, the escorted departure of a visitor who refuses to submit to a strip search is such a reasonable alternative."

The court noted that SNMCF policy already contains the elements of this rule, the problem was that in this case the policy was not followed. Prison visitors must be informed that they can avoid the search by leaving prison premises. The court held that when Castro initially refused to be searched, prison officials should have escorted her from the prison. "They had no authority to conduct a search and the evidence from any subsequent search would need to be suppressed." Lacking probable cause prison officials lacked the authority to detain Castro to obtain a search warrant and had no right to tell her she would be detained for such a purpose. See: *State v. Garcia*, 860 P.2d 217 (NM App 1993).

Media Hype Exposed

Anyone who watches TV or reads corporate media publications is well aware of the unrelenting propaganda barrage of hysterical stories attacking prisoners, criminal suspects, etc., as part of a

"crime wave." With the collapse of the former USSR the ruling elite has been in desperate search of villains and enemies to distract US citizens from meaningful issues like poverty, unemployment, lack of health care, etc. Enter the Crime Wave. Anyone watching TV would think the US is in the midst of a massive upsurge of crime and criminality. Not so according to Fairness and Accuracy In Reporting (FAIR), a media watchdog group. Crime rates in the US have actually slightly declined over the past 20 years, what has changed is media coverage of crime related issues which increased 250% in recent months.

The effect this media onslaught has had is predictable. In June, 1993, 5% of those polled by the *Washington Post* named crime as the most important issue facing the country. By February, 1994, after months of shrill media bombardment 31% of those polled listed crime as the most important national issue, far outstripping any other issue. Asked where they got their information crime, 65% said they learned about it from the media.

In its May/June, 1994, issue of *Extra!* FAIR has a special section analyzing media coverage of crime. The report does an excellent job exposing and debunking these media myths, mainly by pointing out the discrepancies within the media itself. For example, one article in *US News and World Report* states that crime levels fell in 1993, then follows with the assertion that numbers don't matter because it was "the scariest [year] in American history." The racist, classist prejudices of the media are analyzed and exposed. While this issue of *Extra!* is of particular interest to *PLN* readers due its analysis of crime coverage, it is an invaluable source of media analysis that gives an insight into the specific biases of the mainstream media.

This issue also had an article "How 'Reality' Based Crime Shows Market Police Brutality." Debra Seagal, a former ABC editor for *American Detective*, said "police have a tacit agreement with the producers that they'll be shown in a positive light." "A detective commenting on a suspect, 'That's the first white guy I ever felt like beating the fucking shit out of,' for example, is never going to make it on the air." Contrary to their marketing, Seagal reveals that these shows are in fact coached — with police told how to talk, to repeat lines, etc., to "come across better." FAIR also analyzes the racist and

classist bias of these shows which invariably focus on white cops beating down poor people of color. Those interested in a copy should request Volume 7, number 3 of *Extra!*, from: FAIR, 130 West 25th St. NY, NY. 10001 (212) 633-6700. Cost is \$2.50.

Prisoners Retain Right Against Self-incrimination

Coy Phelps is a patient involuntarily committed in a Federal Medical Center (FMC) after having been acquitted of criminal charges by reason of insanity. He filed suit challenging both the statutes allowing his commitment and the conditions of confinement he was subjected to. He claimed that prison officials held, without notice, his incoming and outgoing mail and refused to deliver it to him. Prison officials also allegedly placed him in seclusion after he refused to answer questions which might amount to self-incrimination and he claimed he was punished for refusing to attend institutional meetings held in the chapel, which violated his religious beliefs. The district court granted summary judgment in favor of prison officials (the FMC is operated by the Bureau of Prisons) and dismissed the complaint. The court of appeals for the eighth circuit affirmed in part, reversed in part and remanded.

The appeals court affirmed the lower court's denial of Phelps' motion for the appointment of counsel. The court held that Phelps was an experienced litigant who had failed to present evidence showing on appeal as to how counsel would have helped him or the court. That he was committed to the FMC was merely one factor for the lower court to consider in ruling on the motion. Moreover, he was not indigent, having always paid the filing fees, and did not indicate he was unable to afford counsel.

The appeals court reversed the claims relating to his conditions of confinement. The lower court improperly granted summary judgment to the defendants because it did not notify Phelps that it intended to treat the defendants' motion to dismiss as a motion for summary judgment.

Phelps' claim that he was punished for refusing to answer questions that might incriminate him in as yet uncharged crimes stated a claim. "Before an inmate can be compelled to provide testimony in a prison disciplinary hearing that might incriminate him in later criminal proceedings, the inmate must be offered whatever immunity is required to supplant the privilege and may not be required to waive such immunity." The court held that on remand Phelps should be allowed to amend his complaint to specify whether he was asked questions about past criminal conduct for which he had already been found not guilty by reason of insanity or if he was questioned about criminal conduct for which he could still be charged.

The court notes that a prisoner's constitutional right to send and receive mail may only be restricted for legitimate penological reasons. While prison officials may be able to assert such a reason for keeping his incoming and outgoing mail in storage boxes and not telling him it was not being mailed or delivered, it was improper to dismiss the claims on a motion to dismiss.

On remand Phelps should also be allowed to amend his complaint to clarify the tenets of his religion and how being forced to attend institutional meetings in the prison chapel violated his beliefs. See: *Phelps v. U.S. Federal Government*, 15 F.3d 735 (8th Cir. 1994)

2d Cir. Declines to Rule on Informant Testimony

Jerome Russell is a New York state prisoner. He was incarcerated for allegedly assaulting another prisoner. At the disciplinary hearing the hearing, officer questioned the investigating guard who had provided statements from the victim and three informants who identified Russell as the assailant. At the hearing, Russell requested the victim and three informants' testimony. The victim refused to answer any questions and the presence of the informants was denied. Russell was found guilty and sentenced to 180 days in segregation and a loss of privileges. Russell conducted an administrative appeal which resulted in a reversal of the disciplinary finding. At a second hearing

he was again found guilty, again appealed and again the finding was reversed. No third hearing was ordered and Russell was returned back to the general prison population. Throughout the hearing and appeal process Russell was housed in segregation and denied privileges.

Russell filed suit in federal court under § 1983 claiming that the hearing officer's failure to independently assess the informants' reliability and credibility breached a clearly established due process right. The defendants sought qualified immunity claiming that no such right was clearly established in the second circuit. The district court denied the motion at 782 F. Supp 876 (SD NY) and the defendants appealed.

The court of appeals for the second circuit reversed, holding that there was no clearly established right for prisoners in disciplinary hearings to have informant testimony independently assessed for reliability and credibility by the hearing officer. The appeals court declined to decide the appropriate level of review for such testimony. Instead, the court decided to rule on the narrow question that Russell was properly held in administrative confinement and suffered no deprivation of a protected liberty interest. The court notes that prisoners are not deprived of due process where an administrative appeal has cured a hearing's procedural defects.

Ruling that Russell's segregation was administrative rather than punitive allowed the court to avoid the due process issue. However, while he was administratively appealing the imposed sanction he was denied certain privileges while in segregation. The appeals court held that the denial of these privileges were punitive in purpose and that he could recover monetary damages for their imposition. "The damage would be limited to the loss of privileges, however, because confinement in the SHU pending the appeal was harmless."

The court also did not rule on the question of whether due process is violated by the imposition of prison disciplinary punishment while administrative appeals are pending.

By declining to rule on what procedures must be followed by disciplinary hearing officers using informant testimony on prison hearings, the court essentially grants prison officials continued qualified immunity in the use of such testimony. Regardless of the findings by lower courts in the second circuit that the given procedure was improper, prison officials will be able to escape liability from

money damages by claiming that the law on this issue is not clearly established in the second circuit. See: *Russell v. Scully*, 15 F. 3d 219 (2nd Cir. 1993).

WA Prisoners Must Exhaust State Remedies

John Dewyer is a Washington state prisoner. He is serving a determinate, SRA sentence. At a prison disciplinary hearing he was found guilty of an unspecified offense and sanctioned by 15 days of segregation and 30 days loss of good time, the latter extended his prison sentence. Dewyer then filed suit under section 1983 in US District Court in Seattle.

The attorney general's office filed a motion requesting that the action be stayed until such time as Dewyer had exhausted state habeas corpus remedies. The district court Magistrate Weinberg, granted the motion as well the AG's motion to publish the ruling.

The district court held that whenever a prisoner challenges the length or legality of his/her sentence, that challenge must be brought via habeas corpus, which requires the exhaustion of state remedies, not section 1983 which has no exhaustion requirement. See: *Preiser v. Rodriguez*, 411 US 45, 93 S.Ct. 1827 (1973) and *Young v. Kenney*, 907 F.2d 874 (9th Cir. 1990).

However, the court did not make mention of *Sisk v. CSO Branch*, 974 F.2d 116 (9th Cir. 1992) which held that prisoners challenging disciplinary hearing involving the loss of good time may challenge the hearing via section 1983 when the sanctions include punishment in addition to the loss of good time. Readers will note that habeas remedies do not provide for money damages resulting from constitutional deprivations at disciplinary hearings while section 1983 does.

Washington state prisoners should also be aware that there is a three year statute of limitations as of July 1, 1993, affecting actions against Washington state prison officials. In order to preserve a right of action for money damages prisoners may want to file a section 1983 suit which may be stayed by the court pending the outcome of any exhaustion of state remedies. See: *Dewyer v. Davis*, 842 F. Supp 1304 (WD WA 1993).

Prison Industries Supervisor Liable for Attack

Jay Holloway is a prisoner at the Iowa State Penitentiary (ISP). He was assigned to work in the prison industries building under the supervision of Ray Miller. While at work Holloway was attacked by four other prisoners who believed he had summoned a guard to the work area where they had been drinking. The first attack took place in an empty area. Holloway ran into another room where Miller was sitting at his desk. The attack ceased and Holloway was able to wash the blood from his face; he did not seek assistance from Miller at this point. After washing up Holloway went to his work area, 20 feet from Miller's desk, at which Miller was still sitting, and was again attacked by the same four prisoners. Miller witnessed the attack, during which Holloway's eyelid was poked into his eye, but did not summon help or halt the attack. Holloway was attacked on two more occasions in Miller's presence and Miller did nothing to assist Holloway. The four attacks took place within a twenty minute period. Eventually Miller notified his supervisor of the attacks, who in turn notified security.

Holloway filed suit under § 1983 claiming that Miller had shown deliberate indifference to his personal safety by neither summoning help nor trying to halt the three assaults which he witnessed. He also claimed that supervisory prison officials were liable because they knew or should have known that the prison industries building was inherently unsafe due to its design and staffing. The court appointed counsel and after a bench trial found partially in Holloway's favor.

The court held that Holloway had not shown there was a pervasive risk of harm to prisoners working in the industries building because there was adequate security and assaults were so infrequent as not to place prisoners in fear of their safety. If Miller had followed the security measures in place, the harm to Holloway would have been curtailed. "Thus, the court concludes that the fault here lies not with the plan itself but with its execution by staff." The court discusses the relevant standard by which to determine if a pervasive risk of harm exists.

An interesting note is that Holloway would not cooperate with prison officials and identify his assailants so as not to be labeled a snitch. The court attached importance to this issue in finding prison officials had not been deliberately indifferent to his safety needs because "Holloway, and the other inmates of ISP, help foster such violent attacks by their code of silence." The court states that prisoners have a "shared responsibility" to make prisons safe, presumably by becoming informants.

Defendant Miller did not fare so well. The court held that he was liable for failing to promptly intervene in the assault or to summon assistance. The court rejected Miller's assertion that he did not witness the assaults. Essentially, the court held that Miller had lied because he had a direct interest in the outcome of the case and tailored his testimony accordingly. "Miller's inaction in the face of imminent danger to Holloway's safety by the gang assault on him can only be considered deliberately indifferent." The court cites numerous cases which held that prison staff's failure to intervene in assaults on prisoners by other prisoners subjected them to liability. Holding that Holloway had suffered compensatory damages due to the lacerations and injuries, the court awarded him \$500.00. Because the court found that Miller had "acted with willful, reckless, malicious and callous disregard for Holloway's federally protected right to be free from cruel and unusual punishment. Miller's failure to seek assistance for Holloway while Holloway was repeatedly pummeled by other inmates is unconscionable. Under these circumstances, punitive damages are needed to punish Miller and deter future behavior of a like kind." The court assessed \$1,000.00 in punitive damages against Miller. The court also allowed Holloway attorney fees. See: *Holloway v. Wittry*, 842 F. Supp 1193 (SD Iowa, 1994).

Prisoners Denied Right to Vote

By Paul Wright

In the May, 1994, issue of *PLN* we ran an article, "Giving Cons and Ex-Cons The Right to Vote" which outlined a litigation strategy to obtain just such a

Voting Rights (continued)

right. Nine New York state prisoners at the Green Haven prison filed suit under a strategy similar to that outlined in *PLN*. The district court in this case dismissed the case stating that if any significant steps are going to be taken in the area of voting rights for prisoners the step is best taken by a higher court.

The court notes that the preponderance of minority groups in prisons "is a subject of profound concern. The ability of the judiciary to confront the underlying reasons for this phenomenon is limited." Essentially confirming the role of the judiciary in maintaining the status quo rather than challenging its inherent injustices.

The court states that empowering prisoners to vote in local elections might swamp local electorates and leave prisoners to "guide the destiny" of municipalities. Of course, the court does not note that if such a result were possible it would be due to the policy of most states and the federal government to locate prisons in small, isolated rural areas (or as one commentator put it, welfare for poor white towns) far from where the majority of prisoners come from.

Such policy implications do not exist with regards to prisoner voting at the statewide level or at their former residence, the court held. No appellate court has ruled on this matter yet. Such a ruling would "avoid reducing the weight of the minority vote in the states and in voting for members of the Electoral College, while likewise avoiding discriminatory adverse discrimination against local citizens with the misfortune to live in a political subdivision containing a prison. A ruling of this type, if made, might be based on the importance of voting rights and weakness of contrary imperatives at the statewide level, thus avoiding the need for complex and controversial resort to statistical analyses."

Voting is a fundamental political right. However, courts have consistently upheld the disenfranchisement of felons under state laws. See: *Richardson v. Ramirez*, 418 US 24, 94 S. Ct. 2655 (1974). Analyzing the prisoners' claims under the Voting Rights Act, 42 U.S.C. § 1973(a) the court held that the Act's purpose is to avoid vote dilution and give everyone an effective, equal opportunity to obtain representation in elections.

"Disproportionate racial impact of felon disenfranchisement on a minority voting population does not establish a violation of the Voting Rights Act absent other reasons to find discrimination." The sixth circuit, in *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986) upheld a Tennessee statute which disenfranchised felons, finding it did not violate the VRA. The Wesley court held felons weren't disenfranchised due to their race but due to their decision to commit a crime for which they risk conviction and punishment. The prisoners also claimed that the disenfranchisement for crime amounts to taxation without representation. There are no published cases on this issue but the court cited an unpublished ninth circuit case, *Gage v. Hawkins*, 919 F.2d 144 (9th Cir. 1990), WL 186809, 1990 US App Lexis 20804, where the court rejected a prisoner's claim of the right to register to vote or, in the alternative, to the return of all taxes paid during his imprisonment.

This case should be read by anyone interested in the developing area of law concerning the struggle for prisoner enfranchisement. The court denied the request for appointment of counsel but suggested such an appointment should be sought on appeal. See: *Baker v. Cuomo*, 842 F. Supp 718 (SD NY 1993).

WA S. Ct Upholds Sex Offender Registration

In 1990 the Washington state legislature passed RCW 9A.44.130(1) which requires that all persons who have been convicted of a sex offense and reside in Washington to register with the sheriff in the county in which they reside. Two sex offenders who had been convicted prior to the law's passage challenged its application to them, contending it violated their rights under the Ex Post Facto provisions of the state and federal constitutions. The Ex Post Facto clause prohibits the government from increasing the punishment for crimes after they have been committed or criminalizing behavior after it has been committed.

One of the unique provisions about the Washington sex offender registration law is that it allows police agencies to publicly disseminate the information about

where registered sex offenders are living. There are no guidelines as to which sex offenders' release and/or residence will be publicized. In 1993 Joseph Gallardo was released from prison and police officials publicized where he would be living, this led to a witchhunt where Gallardo's house was burned down and he was, essentially, run out of the state by citizens fanned into a frenzy by the media and police. It is in this context that the sex offender registration law was challenged.

The state supreme court held that the registration law does not violate the Ex Post Facto clause because it is regulatory and not punitive. In reaching this decision it agreed with the Arizona and Illinois state supreme courts who have both upheld similar statutes. See: *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217 (1992) and *People v. Adams*, 114 Ill.2d 381, 581 N.E.2d 637 (1991). Neither of these cases, however, involved the public dissemination of the sex offender's information.

The sex offender registration law is part of the Community Protection Act which also mandated the indefinite confinement of sex offenders, after they have served their sentences, if a jury finds they may be dangerous in the future. To date the Washington state courts have upheld all of the Act's provisions which have been challenged. See: *State v. Ward*, 123 Wn. 2d 488 (1994).

Cross Gender Strip Searches Illegal

David Canedy is a Wisconsin state prisoner. He filed suit claiming that during a shakedown of his housing unit female guards strip searched him, causing him embarrassment, humiliation and mental distress. Male guards were readily available and could have conducted the search. He also claimed that female guards routinely observed male prisoners' private settings: while showering, dressing, defecating, and asleep in various stages of undress. He claimed these actions violated his right to privacy as well as his religious beliefs. The district court dismissed the suit for failing to state a claim upon which relief could be granted. The court of appeals for the seventh circuit reversed and remanded.

The appellate court noted that the right to privacy is firmly protected by the con-

stitution. While all forced observations of the naked body implicate a privacy concern, it is generally considered a greater invasion to have one's naked body viewed by a member of the opposite sex. While prisoner's right to privacy is of necessity diminished in prison, it is not completely extinguished.

While not ruling on the matter directly, in a footnote the court mentions the fact that Canedy's claims might well have failed under *Turner v. Safely*. However, with passage of the Religious Freedom Restoration Act (RFRA) his claims of infringement of his religious rights may well succeed. Given the fact that the RFRA was only passed in November of 1993 this is a developing area of law for prisoners which should be studied by those litigating free exercise claims.

Canedy's objection was not to the strip searches themselves but rather to the manner in which they were conducted, i.e. by members of the opposite sex. Women have a right to be employed in male prisons and courts must weigh that right with that of the prisoners not to be subjected to intrusive invasions of privacy. Thus, no violation of prisoner's rights occur where female guards work in cell blocks, perform pat searches that avoid the genital areas, or the occasional inadvertent sighting of unclothed prisoners in showers or their cells. Prisoner's privacy rights are violated when the observation is more intrusive, like in this case where it involves a strip search in a non emergency situation, or becomes a regular occurrence.

The court cites numerous rulings from other courts which discuss prisoner's right to avoid humiliating or unreasonable strip searches as well as observation by guards of the opposite sex. The lower court had dismissed the suit but stated prison officials should try to adopt measures that afford privacy to prisoners. The appeals court stated: "...where it is reasonable — taking account of a state's interests in prison security and in providing equal employment opportunity for female guards — to respect an inmate's constitutional privacy interests, doing so is not just a palliative to be doled out at the state's indulgence. It is a constitutional mandate." The case was remanded back to the district court for further proceedings. See: *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994)

English Only Rule for Prayer Illegal

DeMont Conner is a Hawaii state prisoner. He filed suit under section 1983 claiming prison officials had violated his due process rights by punishing him for praying in Arabic with another prisoner and that the disciplinary hearing itself did not comport with due process. The district court dismissed the suit by granting summary judgement in favor of prison officials. The court of appeals for the ninth circuit affirmed in part, reversed in part and remanded. An earlier opinion by the appeals court, at 994 F.2d 1408, (See December, 1993, *PLN*) is superseded by this ruling.

The appeals court begins by analyzing Hawaii disciplinary segregation rules and concluding that they create a liberty interest in Hawaii prisoners remaining free from disciplinary segregation. The court then held prison officials had violated Conner's right to due process by not permitting him to call witnesses at the disciplinary hearing. "Prison disciplinary committees may not deny a defendant the right to call important witnesses solely for the sake of administrative efficiency... Rather, they must show the adequacy of their justification for denying a request to present witnesses in a disciplinary proceeding."

The court went on to hold that "In the context of a motion for summary judgement, the prison's burden to show the adequacy of its justification for denying an inmate the right to present witnesses at his hearing is the one it would bear in a motion for a judgement as a matter of law (directed verdict) under Fed.R.Civ.P. 50(a)... Such a burden requires that the evidence "permit only one reasonable conclusion as to the verdict." The court rejected the defendants' argument that staffing shortages and moving Conner to another facility were adequate to meet their burden. The court held the defendants were not entitled to qualified immunity because the right to call witnesses at prison disciplinary hearings has been clearly established since *Wolff v. McDonnell* was decided by the Supreme Court in 1974.

Hawaii prison rules require that prisoners communicate only in the English language. Conner is a Muslim and contends he must pray in Arabic. After being ordered to pray in English, and refusing, he was incarcerated and punished. The appeals court held "It seems clear that the prison's English only rule does not apply to prayer." Even if the interpretation of the rule could be stretched to include prayer, that would violate due process which prohibits imposing punishment on the basis of unusual or unexpected interpretations of plain language. Prison officials were not entitled to qualified immunity on this issue.

The appeals court upheld the dismissal of other claims raised by Conner including challenges to the prison's segregation and custody program, denial of court access and review of confinement. The court remanded the case for trial on the disciplinary and prayer issues. See: *Conner v. Sakai*, 15 F.3d 1463 (9th Cir. 1993).

CO Ad Seg Rules Don't Create Liberty Interest

Vernon Templeman is a Colorado state prisoner. After spending seven years in administrative segregation (ad seg) he was placed in a maximum security general population. A year later he was again placed in ad seg. Despite requesting a three member panel, only one hearing officer conducted the hearing and ordered Templeman placed in ad seg. The order was upheld on administrative appeal. Templeman filed suit claiming that this violated his right to due process and equal protection of the law. The district court dismissed the suit as frivolous. The court of appeals for the tenth circuit affirmed.

The appeals court noted that prisoners have no right under the federal constitution to remain in the general prison population. Any such right must be created by the state. After examining Colorado DOC Regulation 600-2, governing ad seg placements, the court concluded that no discretion is placed on prison officials' decisions to place prisoners in ad seg, thus, no due process liberty interest has been created. Colorado prisoners can be placed in ad seg for any reason or no reason at all. That Templeman's request for a three person hearing committee was denied did not matter because it was discretionary.

Prisoners in ad seg are denied numerous privileges afforded to prisoners in the general population. This includes the ability to earn good time, be considered for sentence commutation and to hold a prison work assignment. The court held that none of these deprivations amounted to a constitutional violation because none create a federally protected liberty interest, all are within the discretion of Colorado prison officials to grant or deny.

Templeman's equal protection claim, that he was placed in ad seg while other prisoners similarly situated him were not, likewise failed. To state an equal protection claim a prisoner must assert a suspect classification such as their race or religion which results in disparate treatment by prison officials. Readers will note that this ruling is based on the facts peculiar to this case, namely Colorado prison regulations which do not limit or channel prison officials' discretion regarding ad seg placements. See: *Templeman v. Gunter*, 16 F.3d 367 (10th Cir. 1994).

Filthy Cell Standards Clarified

Two Nebraska jail prisoners, one convicted of a crime, one not yet convicted were moved into a jail cell containing a "toilet... covered with dried feces on both the inside and outside, the sink was covered with hair and vomit, the floor was covered with garbage and rotting food, and the walls were covered with dried human mucus." The detainees complained but jail officials refused to move them to another cell or to provide them with cleaning supplies. They were unable to clean the cell until a new shift came on and they were given limited cleaning supplies a few hours later and additional supplies the next day. They filed suit claiming that the filthy cell violated their constitutional right to be free from cruel and unusual punishment. The case went to trial and a jury found in the detainee's favor and awarded them each one dollar in nominal damages. The court awarded them attorney fees and costs. The court of appeals for the eighth circuit reversed and remanded.

The appeals court held that the plaintiffs had failed to state a claim. At the outset, the court resolves the question of what standard is applied to pretrial de-

tainees as opposed to convicted felons. "...the legal standard we apply to pretrial detainee Whitnak's conditions of confinement claim is identical to the legal standard we apply to the convicted Arellano's conditions of confinement claim." While prisoners and detainees are entitled to sanitary conditions of confinement the court focused on the duration of such conditions.

"The outcome of this case is largely dependent on the very short period of time during which the plaintiffs were confined in Cell C-18 before they were given full and adequate cleaning supplies. Conditions such as a filthy cell, may be tolerable for a few days and intolerably cruel for weeks or months." The eighth circuit held that overall conditions of confinement cannot violate the eighth amendment unless the plaintiff can identify a specific deprivation of a single human need such as food, warmth or exercise. "Where we have recognized constitutional violations with short periods of time, we have done so because the plaintiffs were deprived of an identifiable human need immediately upon being subjected to the inhumane condition."

The court states that it has no doubt that reasonably adequate sanitation and "the ability to eliminate and dispose of one's bodily wastes without unreasonably risking contamination are basic identifiable human needs of a prisoner protected by the eighth amendment, this record contains no showing that either of the plaintiff's attempts to meet this body's needs were interfered with before cleaning supplies were provided to them. Neither does the record show that they made any requests to use alternative toilet facilities which were refused."

The court condemned the cell conditions and stated "We can easily conclude that such conditions could cause actionable harm if a prisoner were exposed to them for a much longer period of time. While the length of time a prisoner must endure an unsanitary cell is undoubtedly one factor in the constitutional calculus, the degree of filth endured is surely another, and in our view, the length of time required before a constitutional violation is made out decreases as the level of filthiness endured increases." The court made its ruling in this case because it could find no constitutional violation because the plaintiffs were not actually harmed by the cell conditions due to the brevity of their stay. See: *Whitnack v. Douglas County*, 16 F.3d 954 (8th Cir. 1994).

Non-English Mail Okay

Khanfeuang Thongvanh is an Iowa state prisoner. Thongvanh is a native Laotian whose primary language is Lao, though he speaks some English. Prison rules mandate that all incoming and outgoing prisoner correspondence be in English to allow for censorship. Prison officials at the Iowa State Reformatory (ISR) exempt Spanish and German speaking prisoners from this requirement because Spanish and German speaking staff members are available. Thongvanh was granted a limited exception to the policy and was allowed to correspond with his parents and grandparents in Lao, and such mail was routed through a refugee service center in Des Moines for translation. However, he was not allowed to correspond with any other friends or relatives in Lao. Thongvanh filed suit claiming that the English only rule violated his first amendment rights. After a jury trial, he was awarded \$4,000 in damages. The district court reduced the damages awarded and entered judgment for only \$2,000. The court of appeals for the eighth circuit upheld the jury verdict that the English only policy violated Thongvanh's first amendment rights and reinstated the award of \$4,000.

The appeals court begins by noting that prisoners retain a first amendment right under the US constitution to send and receive mail. This right may be abridged by prison officials in an attempt to maintain security within the prison system.

In upholding the jury verdict the appeals court notes that evidence in the case showed that German and Spanish speaking prisoners were exempted from the English only rule. While translating these materials was more convenient for ISR officials they had a readily available, and free, alternative with the refugee center willing to translate letters in Lao. Prison officials admitted that while all letters were scanned and checked for contraband only randomly selected letters were actually read by prison officials.

The jury award of \$4,000 was restored because there was no explanation in the record for the judge's reduction of the jury award. See: *Thongvanh v. Thalacker*, 17 F.3d 256 (8th Cir. 1994).

Change In Parole Hearings Violates Ex Post Facto

PLN readers may recall that in the December, 1993, issue we reported on the conflict within the ninth circuit on whether changing the frequency of parole board hearings violates the Ex Post Facto provisions of the constitution. In *Powell v. Ducharme*, 998 F.2d 710 (9th Cir. 1993) the ninth circuit held that changes in Washington state law which moved prisoners' parole eligibility hearings years past what it had initially been set at did not violate the Ex Post Facto clause. Three days later, in *Flemming v. Oregon Bd. Of Parole*, 998 F.2d 721 (9th Cir. 1993) the court held that a change in Oregon parole rules which changed the frequency of parole hearings did violate the Ex Post Facto Clause.

That conflict on this issue has only deepened. Jose Morales is a California prisoner convicted of murder in 1971, released on parole in 1980 and again convicted of murder. At the time of his second murder conviction California law provided for annual parole hearings. This law was later amended to allow for parole consideration hearings every three years.

Morales first became eligible for parole in 1989 and was found unparoleable. His next hearing was scheduled three years later. Morales filed a habeas corpus petition claiming that the change in parole eligibility hearings violated his rights under the Ex Post Facto clause, namely that he was entitled to the annual reviews in effect at the time he was convicted. The district court dismissed the petition. The court of appeals for the ninth circuit affirmed in part, reversed in part and remanded.

The court explains the provisions of the Ex Post Facto clause which prohibit the government from punishing a crime more severely after it was committed than when it occurred. The reviewing court examines the state of the law at the time the crime is committed, not the law in effect at the time of the parole hearing.

"Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility... Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the

ex post facto clause." The court reached this conclusion because denial of parole is part of a defendant's punishment.

The court held that Morales is entitled to annual parole hearings but points out it makes no finding as to the wisdom of actually releasing him on parole. See: *Morales v. California Dept. of Corrections*, 16 F.3d 1001 (9th Cir. 1994).

Delay in Treatment States Claim

Dean Delker is an Oregon state prisoner. He filed suit under § 1983 seeking injunctive and monetary relief from prison officials who refused to authorize surgery to treat his inguinal hernia (this is a hole in the abdominal wall where the intestine pokes through; it is easily treated but left untreated causes extreme pain and even death). After the suit was filed Delker was operated on. After a bench trial the court found John Vargo, the chief medical officer at the Oregon State Penitentiary (OSP), to be liable for delaying the surgery that Delker required.

A consulting doctor recommended that Delker receive surgery to reduce the hernia. Delker was told he was being placed on a waiting list and that he might not receive the surgery because the prison was on a tight budget. After seven months of waiting Delker wrote the prison superintendent noting he had yet to receive medical treatment for his hernia which was constantly bothering him. Dr. Vargo replied to the effect that he had received proper medical care and that his hernia was not an emergency and was classified as elective surgery.

After the action was filed Delker was assigned to the prison general labor pool with no restrictions on his physical activities. After continued complaints he was given a weight lifting restriction and a truss, which the defendants told the court were unnecessary. The court appointed an independent medical expert to examine Delker. The expert concluded Delker suffered from a hernia which presented a well defined risk of bowel strangulation and was itself painful and limited activity. He recommended surgery. The defendants disagreed with his conclusions and cited "strategic legal reasons" in authorizing the surgery.

The court disagreed with the defendants' contention that Delker had not

been injured by the two year delay in treatment finding that while he did not suffer long term physical harm the pain and suffering he endured while awaiting surgery was indeed compensable harm.

A total of three doctors who testified at the trial agreed that surgery was the standard treatment for this type of hernia though some patients may chose to forego it. But OSP prisoners have no choice in accepting or foregoing surgery because Dr. Vargo had established a de facto policy of never authorizing surgery for hernias. The court rejected the defendants' excuses for not performing hernia surgery on prisoners because prison officials simply cannot refuse to treat hernias. The court was disturbed by testimony that in effect, there is no "waiting list" for surgery at OSP. Dr. Vargo conceded at trial that prisoners placed on the waiting list would never receive surgery, no matter how long they waited, unless the condition deteriorated to the point that immediate surgery was required.

The court denied Vargo qualified immunity for his actions in this case. The court held that the law is clearly established that prisoners must receive necessary medical treatment. Given the facts of the case: that Vargo was aware of Delker's hernia and the need for treatment but nonetheless refused to provide such treatment because he had a de facto policy of not paying for such operations in order to minimize the cost of medical care for prisoners. No public official would have believed this conduct to be lawful, this was aggravated by prison officials lying about the existence of a "waiting list" for treatment.

The court notes that in this case the doctors' medical recommendations were tempered by economic and legal considerations. A reviewing court is not bound by doctors' legal opinions as to the state's duty to provide medical care to prisoners. The court rejected the defendants' claim that prison officials must only provide care for life threatening conditions. Vargo violated Delker's rights by establishing a rigid rule denying treatment regardless of prisoners' complaints of pain and incapacitation.

Also rejected was prison officials' attempt to avoid their duty to provide medical treatment by labeling such treatment as "elective" rather than necessary. The court awarded Delker \$5,000 in compensatory damages. See: *Delker v. Maas*, 843 F. Supp 1390 (DC OR. 1994).

Shackling States Claim

Jerome Williams is a Michigan state prisoner. After damaging the toilet in his cell, Williams was removed from his cell and placed in restraints where he was fully restrained by chains and shackled to his bed; where he remained for 73 hours. He was allowed to smoke and use the toilet from time to time. The restraint was carried out on the orders of Ionia Maximum Correctional Facility (IMCF) Deputy Warden Peter Vidor. A Sgt. Ray placed Williams in the restraints and periodically checked on his condition. During the restraint Williams complained of abdominal pain where he had an exposed stitch from an old stab wound and colostomy closure. A nurse wrapped a pillow case around the abdominal chains which remained around him. At no time during the period of restraint was Williams violent or otherwise resistant to his treatment. Williams filed suit under § 1983 claiming that the shackling violated his eighth amendment, due process and equal protection rights.

The district court granted summary judgment in favor of the defendants and dismissed the suit. The court of appeals for the sixth circuit affirmed in part, reversed in part and remanded.

The appeals court affirmed dismissal of the suit pertaining to sergeant Ray because he did not make the decision to shackle Williams nor keep him there any particular length of time and did carry out his duty to check on Williams from time to time.

The appeals court reversed the granting of summary judgment for Vidor because the record showed that Vidor had authorized the initial 24 hours of chaining but the subsequent period may have been approved by a DOC deputy director. With the conflict in the record it was not clear that Vidor was entitled to summary judgment. Whether the 73 hour restraint was objectively harmful could not be determined as a matter of law. These problems were compounded by the fact that the district court had not allowed Williams to conduct discovery in the case before dismissing the suit.

The court remanded the case for further proceedings, namely appointment of counsel, conducting discovery and completing the record with regards to state law claims.

Judge Jones filed a lengthy dissent disputing the majority's statement of facts. Jones disagreed with the affirmance of summary judgment for Sgt. Ray because it was not clear that Ray had in fact carried out his duties towards Williams. Jones gives a lengthy analysis of the due process that should have been provided before Williams was shackled as well as addressing other issues not covered by the majority opinion. See: *Williams v. Vidor*, 17 F.3d 857 (6th Cir. 1994).

No Right to Self-Defense in Prison

John Rowe is an Indiana state prisoner. A prisoner named Michael Evans was moved into a cell next to Rowe and Rowe complained to staff, who did nothing. Evans sent Rowe a note demanding sexual favors. The next morning Evans entered Rowe's cell and attempted to rape him, Rowe screamed for help and hit Evans with a hot-pot in an attempt to fend off the attack. Another prisoner separated the two men. Prison officials infringed and punished all three prisoners.

At his disciplinary hearing Rowe claimed self defense. The hearing committee found that Rowe had committed battery by hitting Evans and said there was no defense of self-defense in Indiana prison disciplinary hearings. However, self defense could be a mitigating circumstance. As a result, Rowe was ordered to serve one year in disciplinary segregation which was then suspended. Rowe filed suit claiming that the denial of a right to self defense in prison disciplinary hearings violates federal due process. The district court granted summary judgment for prison officials holding that because the punishment had been suspended the disciplinary ruling against Rowe did not implicate the due process clause. In the alternative, the court held that even if due process were implicated, the deprivation was reasonably related to legitimate penological goals. The court of appeals for the seventh circuit affirmed.

The appeals court analyzed Rowe's claim to be one of substantive due process because he claimed the prison could not deprive him of his right to self defense. The court gives a detailed discussion of the various types of due process and the appropriate legal standard of review. Rowe claimed that under Indiana Criminal Code § 35 41-3-2, which relates to criminal prosecutions, he had a right to self defense. The appeals court declined to rule on this issue holding that a mere violation of state law does not create a federal constitutional right that can be enforced under § 1983.

As a matter of substantive due process the court held that there is no federal constitutional right to self defense, either in or out of prison. "Given that there is virtually no support for such a judicially created right in the criminal law, we believe that manufacturing such a right for application in non-criminal, prison disciplinary proceedings is even less justified." "...prisoners do not have a fundamental right to self defense in disciplinary proceedings." Even if Rowe did have a constitutional right to self defense it could be denied as being reasonably related to prison objectives of deterring violence.

The court also analyzed Rowe's claims as a procedural due process claim and again held he had no right to self defense. However, it did reject the lower court's holding that by suspending the imposition of punishment a due process liberty interest had been implicated. "We do not think that prison officials may find a prisoner in violation of prison rules, then subject him to the open-ended threat of a year of disciplinary segregation without implicating a protected liberty interest." Because Rowe was allowed to present his self defense claim in mitigation of his punishment he was not deprived of his right to procedural due process.

Judge Ripple filed a dissent noting that this is the first court ruling to ever hold that the state may, "consistent with the due process clause, impose, as a matter of absolute liability, a sanction for protecting oneself from death or bodily harm." "But to forbid all resistance to all threats to life and bodily integrity is not to ensure a lack of violence, as the majority suggests, but to leave the weak and vulnerable the easy prey of the strong and the vicious. It is indeed a novel proposition of constitutional law to hold that a state, having deprived a person of liberty according to law, can further punish that individual for attempting to stay alive, even when the state itself is not ready, willing, or capable of assuming that responsibility by substituting its own strong arm for that of the prisoner-victim."

Readers who are litigating failure to protect claims against prison officials may be able to use this ruling to show that prison officials assume complete responsibility for protecting prisoners from harm because prisoners, at least in Indiana and the seventh circuit, have no right to self defense and thus, must rely on the state for protection. See: *Rowe v. DeBruyn*, 17 F.3d 1047 (7th Cir. 1994).

Urinalysis is Search

Anthony Lucero is a Colorado state prisoner. He refused prison official's order to submit a urine sample for urinalysis testing and was incarcerated, found guilty and punished for refusing to obey an order. Lucero filed suit under § 1983 claiming that the urinalysis violated his rights to be free from unreasonable searches and seizures, his right against self incrimination and denied him his right to counsel. The district court dismissed the suit for failing to state a claim upon which relief could be granted.

The court of appeals for the tenth circuit affirmed in part, reversed in part and remanded. The court held that even though Lucero did not submit to the urinalysis his fourth amendment rights were still implicated because he was punished for refusing to submit to the test. While no court has addressed this issue regarding prisoners, other courts have held that government employees may properly raise a fourth amendment claim to an employer's order to submit a urine sample if an adverse consequence will flow from refusal. In light of these cases the court held that prisoners may raise fourth amendment challenges to prison officials' request for urine samples.

Because a urinalysis is a search under the fourth amendment, it must be conducted in a reasonable manner. While the random urine collection and testing of prisoners is a reasonable means of combating unauthorized narcotics use by prisoners and does not violate the fourth amendment; it was not clear on the record of this case that Lucero can prove no set of facts entitling him to relief. The court suggests that there are circumstances, unstated in the ruling, which would cause a urinalysis request to violate the fourth amendment. This claim was remanded to the lower court for further proceedings.

The appeals court held that the fifth and sixth amendment claims were properly dismissed. Providing urine samples does not violate the fifth amendment's right against self incrimination. The fifth amendment only applies against compelled testimonial facts disclosed by an individual. Testing bodily fluids for drugs or alcohol is not "testimonial" and thus does not implicate the fifth amendment.

Likewise, Lucero had no sixth amendment right to counsel when asked to provide the urine sample because no adversary criminal proceedings had been initiated against him. Readers should note that this case has been decided on a motion to dismiss, not on its merits. The courts have almost uniformly upheld the ability of prison officials to obtain and conduct urine tests of prisoners. See: *Lucero v. Gunter*, 17 F.3d 1347 (10th Cir. 1994).

Prisoners Have Right to Jury from Community

Emmanuel Mitchell is a Tennessee state prisoner. He sued prison officials claiming excessive use of force and placement in an unsanitary cell. After a jury trial judgment was entered in favor of prison officials, Mitchell filed a motion for a new trial claiming that the verdict went against the weight of the evidence and that he was denied a jury composed of a fair cross section of the community. The district court denied the motion and affirmed the jury verdict.

The Jury Selection and Service Act, 28 U.S.C. § 1861-1878, is a broad policy statement governing jury selection in federal district courts. The Act forbids discrimination based on race, religion, gender, economic status, etc. Parties may object to the composition of a jury before voir dire is conducted. The court held that Mitchell's objections were time barred because he did not make them before voir dire or within seven days of discovering the problem.

Plaintiffs in civil rights suits retain a federal constitutional right to a jury composed of a fair cross section of the community. Such a selection is necessary for the fairness of the judicial process. The court held that plaintiffs retain this right in criminal and civil trials.

The court denied Mitchell's motion by holding he had failed to show that blacks were under represented on the jury panel in light of the total number of eligible black jurors in the Nashville Division of the Middle District of Tennessee. "More than mere numbers must be provided to conclude that a group has been systematically excluded as potential jurors." The court gave a lengthy discussion of the standards used to determine if a plaintiff has been denied the right to a jury composed of a fair cross section of the community. See: *Mitchell v. Morgan*, 844 F. Supp 398 (MD TN 1994).

Administrative Exhaustion May Be Required

Leopold Pedraza is a Texas state prisoner. He filed suit under § 1983 claiming prison officials harassed him because of his race, national origin and prior litigation. At no time did Pedraza file grievances or complaints with prison officials concerning his allegations. A magistrate ordered the suit stayed for ninety days to allow Pedraza time to exhaust administrative remedies. Pedraza did not pursue his administrative remedies and his suit was dismissed.

The court of appeals for the fifth circuit affirmed. The appeals court notes that under 42 U.S.C. § 1997e federal courts have the discretion of requiring prisoners to exhaust prison administrative remedies before having their cases heard in federal court. The purpose of this rule is to reduce the number of prisoners suits in federal courts and improve relations between prisoners and prison officials.

In this case Pedraza admitted he had only gone through one of three steps in the prison grievance process. The appeals court held that "District courts have the power to dismiss prisoners' civil rights complaints with prejudice after granting a section 1997e continuance" when the prisoner does not pursue his administrative remedy. Readers will note that the section 1997e requirement applies only to those prison grievance systems which have been certified by the district court as complying with the statute. The case has a publication date of 1990 but was actually published on May 2, 1994. See: *Pedraza v. Ryan*, 18 F.3d 288 (5th Cir. 1990).

Court is Ultimate Arbiter of Consent Decree

In 1984 the United States government and the state of Michigan entered into a consent decree which required improvements in Michigan penal facilities so that they would comport with minimal constitutional standards. After several years of improvements and monitoring the parties filed a joint motion in 1992 requesting that the district court dismiss portions

Court is Arbiter (continued)

The district court refused to accept the parties stipulation in its entirety and thus did not vacate the decree. The state of Michigan appealed and the court of appeals for the sixth circuit affirmed.

"Because the 'power and prestige' of the court rests behind a consent decree, a district court is not simply empowered, but is actually obligated, to exercise its independent judgment regarding compliance with a decree. Otherwise, a court would simply become a rubber stamp for the parties, and the policing role of the court would become meaningless." Once a decree is entered it becomes the court's judgment. The court has an obligation to exercise jurisdiction in a meaningful manner, "it may not blindly defer to the stipulation of the parties."

The court noted that the explicit language of the decree set forth a procedure by which the decree could be terminated. The court was not bound to terminate the decree as the parties could only make an application for the court to do so. Before the decree can be dismissed the court must make a determination that the state has complied with its terms. See: *United States v. Michigan*, 18 F.3d 348 (6th Cir. 1994).

Court Upholds Denial of Prisoner Witness Fees

In 1991 a unanimous Supreme Court held in *Demarest v. Manspeaker*, 111 S.Ct. 599 (1991) that prisoners were entitled to witness fees whenever they testified in federal courts. Just before leaving office George Bush signed into law a modification of 28 U.S.C. § 1821 which forbade paying prisoners witness fees. *PLN* covered the issue at the time. The fee in question is \$40 per day.

Michael Moran is a federal prisoner who was brought to a county jail to testify as a potential witness pursuant to a federal court subpoena. He did not actually testify but spent 27 days in the jail. He was refused witness fees and filed suit challenging the constitutionality of 28 U.S.C. § 1821(f) which denies prisoners witness fees. The district court upheld the statute. The court of appeals for the seventh circuit affirmed, giving Moran short shrift.

"It is hardly irrational to deny fees and allowances to prisoner witnesses. Their time is the government's. If the government decides that some of it shall be spent in the witness box, they are no more entitled to compensation than they are entitled to be compensated for time spent cooling their heels in a prison cell." See: *Moran v. United States*, 18 F.3d 413 (7th Cir. 1994).

RFRA Supersedes O'Lone

As reported in *PLN*, Vol. 5, No. 6, the Religious Freedom Restoration Act (RFRA) was signed into law by President Clinton in November, 1993. It forbids government infringement of religious rights and claims. The RFRA is already being applied to prisoner civil rights actions with initial victories for prisoner plaintiffs.

Minister Allah is a Pennsylvania state prisoner. He filed suit against prison officials claiming they had violated his right to free exercise of religion by denying a request to establish an opportunity to worship for a Muslim sect named the Temple of Islam. Prison officials denied the request because other Muslims were already permitted to worship at the prison. Allah submitted affidavits from Nation of Islam spiritual leaders noting the differences between the faiths. Prison officials sought summary judgment which the district court denied, holding material issues of fact remained to be resolved.

In 1987 the Supreme Court decided *O'Lone v. Estate of Shabazz*, 482 US 342, 107 S.Ct. 2400 (1987) which had the effect of significantly limiting prisoners' religious rights. The decision instructed federal courts to uphold prison officials' decisions that violated prisoners' religious rights as long as the decision was "reasonably related to a legitimate penological purpose". The RFRA specifically applies to prisoners and supersedes *O'Lone*.

"The compelling interest test set forth in *Sherbert v. Verner*, 374 US 398, 83 S.Ct. 1790 (1963) now controls all controversies involving substantial state burdens on

of the consent decree. The rationale behind the motion was that the state had allegedly complied with those terms of the decree.

religious practice... Courts must apply this test with regard to the relevant circumstances in each case... Specifically, the Act's adoption of the compelling interest test was intended 'to restore the traditional protection afforded to prisoners to observe their religions which was weakened by the decision in *O'Lone v. Estate of Shabazz*.'"

"The Act rejects the *O'Lone* reasonableness standard and embraces the compelling interest test as articulated in *Weaver v. Jago*, 675 F.2d 116 (6th Cir. 1982)."

That test required that the "asserted justifications of such restrictions on religious practices based on the State's interest in maintaining order and discipline must be shown to outweigh the inmate's First Amendment rights and only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

The court held that in this case prison officials' bald assertions of a security interest was not sufficient to meet the RFRA requirements of an articulated compelling state interest. The state, in effect, forces Temple of Islam adherents to worship with the Nation of Islam or not worship at all. The government is forbidden from favoring one religion over another as well as questioning the rationale or differences between honestly held religious beliefs. Thus, prison officials were not entitled to summary judgment on this record. See: *Allah v. Menei*, 844 F. Supp 1056 (ED PA 1994).

RFRA Has Retroactive Application

Adherents of the Hebrew Israelite faith challenged Florida prison regulations which forbade their receipt of Hebrew Israelite literature. A class action suit challenging the censorship culminated with a victory for the prisoners at 641 F. Supp 312 in 1986. The court of appeals for the 11th circuit affirmed in part, reversed in part at 840 F.2d 781 and the Supreme Court remanded the case for consideration in light of *Thornburgh v. Abbott*, 490 US 401, 109 S.Ct. 1874 (1989). In January of 1994 the district court reaffirmed its ruling in favor of the prisoner plaintiffs.

The court held that not only was *Thornburgh* applicable to the case but because the literature involved was religious in nature the Religious Freedom Res-

toration Act (RFRA) also applied. (For an explanation about the RFRA see *PLN*, Vol. 5, No. 6). While mail censorship was not specifically mentioned in the RFRA it applies to all cases where the free exercise of religion is substantially burdened by government action. While the events in issue occurred several years before the passage of the RFRA the court held that the Act was to be applied retroactively.

The court held that the complete ban on Hebrew Israelite literature violated both the first amendment and the RFRA. The court upheld the due process provisions of the Admissible Reading Material Rule, 33-3.012, Fla. Admin. Code as providing sufficient due process in the event reading material was censored by prison officials. The court readopted its 1986 ruling in the prisoners' favor. See:

Photos Unlawful

Scott Lattany was a federal pretrial detainee representing himself pro se on criminal charges in Philadelphia. Lattany was taken from his cell to the jail parking lot where he and other prisoners were photographed by U.S. Marshalls. Lattany protested the picture taking as illegal and racist, one of the marshals cursed him, using racist epithets, and told him to shut up. En route to the courthouse the van the plaintiff and Marshalls were traveling in was involved in an accident. Lattany and another prisoner were injured. After a delay of several hours the prisoners were taken to a hospital, given pain medication and returned to jail. Lattany filed suit claiming that the unnamed marshalls had violated his right to privacy by taking his picture in the parking lot and his right to medical care by delaying medical treatment after the accident. The government moved for dismissal or, in the alternative, for summary judgment, which the court denied.

The court held that both prisoners and pretrial detainees have a federal constitutional right to privacy which prohibits being photographed without their consent and without a law enforcement purpose. The supreme court has held prisoners "are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." *Houchins v. KQED, Inc.*, 438 US 1, 98 S.Ct. 2588 (1978). Thus the marshalls'

actions were unlawful. However, the court granted the defendants qualified immunity on this issue by holding that this right was not sufficiently well established in the third circuit so as to alert the marshalls that their actions were unlawful.

The delay in providing medical treatment for injuries suffered while in government custody is well established. Thus, the marshalls were not entitled to qualified immunity for failing to promptly take Lattany to a hospital. This is not a ruling on the merits but merely a preliminary determination as to whether Lattany has stated a claim sufficient to withstand dismissal. See: *Lattany v. Four Unknown U.S. Marshalls*, 845 F. Supp 262 (ED PA 1994).

FL DOC To Deport Aliens

Florida Governor Lawton Chiles announced on March 17, 1994, that he hopes to persuade federal immigration officials to let the state release foreign felons convicted of nonviolent crimes and then ship them home. The Immigration and Naturalization Service (INS) has identified 2,700 Florida state prisoners as undocumented immigrants, while the state DOC puts the number at more than 4,100.

Talks between the Governor's office and the INS are still in the preliminary stages. Under the plan, the state would grant clemency to nonviolent illegal immigrant convicts who agree to be deported or who already face deportation orders once they complete their prison sentences. The prisoners would then be turned over to the INS and deported to their country of origin. If the illegal immigrants returned to Florida and were picked up by police, they would be returned to prison to serve the remainder of their prison sentences. No Cubans would be eligible because the United States does not have diplomatic relations with Cuba.

The deportation plan is expected to save the state millions of dollars it would otherwise spend to keep the illegal immigrants in prison. The federal officials quoted in the *Seattle Times* article of March 18, 1994, said Florida would be the first state to use such a plan to get rid of foreign prisoners and free-up prison space for American prisoners. Not mentioned in the article is the fact that Washington state has had a similar program for about a year which

has not resulted in significant numbers of prisoners being deported.

The shortcomings to this type of plan is that because those affected are serving sentences for nonviolent property offenses their sentences are relatively short to begin with. By the time the necessary paperwork has been processed between federal and state agencies, which in Washington does not begin until the prisoner has reached his final destination within the DOC, they are close to release anyway. The result is that any savings are relatively small and likely offset by the increased bureaucratic expenses involved.

Transport of Prison Made Goods Illegal

Preston Glove Company is a Mississippi textile manufacturer who entered into a contract with Magnolia State Enterprises, a quasi governmental business incorporated pursuant to the Mississippi Prison Industries Act of 1990, for the use of prison laborers and Magnolia facilities. Under the contract Preston Glove provided the materials and paid Magnolia \$1.86 per dozen gloves manufactured by prison slave labor. On December 3, 1993, federal treasury agents conducted a search of Magnolia's operation at the Mississippi State Penitentiary (MSP) at Parchman and seized various items as possible violations of 19 U.S.C. § 1304 (mislabeling foreign made goods) and 18 U.S.C. § 1761, also known as the Ashurst Summers Act, which forbids the transport of prison made goods in interstate or foreign commerce. Preston Glove filed suit seeking declaratory relief as to whether or not 18 U.S.C. § 1761 is being correctly interpreted by the government. The suit claims the government's actions have interrupted the contractual relationship between Magnolia and Preston. The government has not yet prosecuted anyone but that remains a possibility.

The district court held that the Act was constitutional on its face and as applied. This case is of interest to prisoners in facilities which manufacture goods for sale to private business that do not pay prisoners at least minimum wage. 18 U.S.C. § 1761 provides: "(a) Whoever knowingly transports in interstate commerce or from any foreign country into

Transport of Goods (continued)

prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined not more than \$50,000 or imprisoned not more than two years, or both."

This law was passed by Congress in 1935 to prevent prison slave labor from competing with business and labor outside of prisons. The constitutionality of the statute was upheld by the supreme court in *Kentucky Whip & Collar Co. v. Illinois C.R. Co.*, 299 US 334, 57 S.Ct. 277 (1937). That court held: "The Act makes it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor into any state where the goods are intended to be received, possessed, sold or used in violation of its laws." While few courts have since addressed the statute those that have likewise upheld it. See: *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992) and *Harker v. State Use Industries*, 990 F.2d 131 (4th Cir. 1993).

Preston Glove sought a declaratory judgment to the effect that the Act did not ban goods manufactured by prisoners in penal facilities. The court declined to do so because it went against both the plain language of the statute and congressional intent. The court held: "That 18 U.S.C. § 1761 is interpreted to prohibit the interstate transportation of goods, not only made by convicts or prisoners, but also, those manufactured in penal or reformatory institutions."

Readers should note that subsection (c) of the Act allows the interstate transportation of prison made goods after certain fair labor laws have been met, i.e. prisoners are paid the minimum wage. Prison manufacturing facilities not complying with the Act should be reported to both the Treasury Department and Justice Department for investigation. See: *Preston Glove Co. Inc. v. Bentsen*, 845 F. Supp 401 (ND Miss 1994).

Texas Prison Reform Suit May Reopen

by Tim Queen

In 1972, a Texas state prisoner, David Ruiz, filed a lawsuit in Federal Court alleging many conditions in the Texas prison system violated the constitutional rights of those incarcerated. The suit was consolidated with other Texas prisoners' complaints and certified as a class action suit. It would become one of the most costly and sweeping state prison reform suits in the nation's history.

In 1980, eight years after Ruiz had filed his suit, the case went to trial in the Southern District of Texas before Judge William Wayne Justice. At the conclusion of the 159 day trial, Judge Justice found that many of the conditions and practices of the Texas prison system did indeed violate fundamental constitutional rights of those incarcerated in the Texas Department of Corrections, and ordered immediate changes. *Ruiz v. Estelle*, 503 F.Supp. 1265 (S.D. Tex. 1980) affirmed in part, modified in part, reversed on other grounds 679 F.2d 1115 (5th Cir. 1982). Several of the court ordered remedies included: reduction of overcrowding and placing a population cap of 95% of rated capacity, elimination of the "building tender" system which placed some prisoners in authority over other prisoners, improvement of access to the courts, improvement in recreation programs, and improvement in all areas of medical care for prisoners. The court also appointed Special Masters to assist prison officials in meeting the court's orders and to provide periodic progress reports.

Just over a year ago, in December of 1992, Judge Justice signed the final decree in the Ruiz suit, ending 20 years of litigation — citing the "remarkable and palpable change" that had occurred in the Texas prison system. However, Judge Justice was without reservation in warning prison officials that their failure to continue to adhere to the constitutional standards set out in the court's order would result in the court utilizing its continuing jurisdiction to find contempt and reopen the case.

It seems that just 15 months later, Texas prison officials may not be ready to manage their own affairs without court intervention. On March 30, 1994, Judge Justice signed an order giving the Texas Attorney General's Office and prison officials 60 days to investigate and file a report with the court in response to several motions and affidavits filed by inmates claiming the denial of proper medical treatment. Judge Justice has stated that after the state responds he will decide whether to conduct a hearing or reopen the case.

In his order, Judge Justice cites complaints that many prisoners at the Ramsey I unit have been denied proper medical treatment, that prisoners with AIDS are denied medical care, and that prisoners are assigned to perform work that they should not do because of their medical conditions. In the order, Judge Justice states, "Petitioners allege that an inmate, Frank P., had a piece of metal lodged in his stomach; was denied medical care; and had to perform surgery on himself to remove the metal, and there are allegations that a prisoner died as a result of a lack of medical treatment. The inmate allegedly was experiencing severe abdominal pain and vomiting; attempted to obtain medical treatment, but was told to take Maalox, and died in his cell after several days."

Of special interest to Texas prisoners is a new organization, Prisoners' Rights Organization for Incarcerated Texans (PROFIT), which is seeking both prisoners and civilians who are sympathetic to the organization's goals of improving Texas prisoners' conditions. PROFIT is presently engaged in gathering information in order to get Ruiz reopened. Texas prisoners who have experienced denial of medical treatment (or other violations of the Ruiz decree) should promptly contact one of the attorneys for the Ruiz suit: Donna Brobry or William Bennett, whose addresses should be available in each unit's law library. Persons interested in PROFIT may contact one of the following for more information: David Ruiz #392276, Rt. 1 Box 150 Tennessee Colony, TX 75884 Kim Brown, President PO Box 2444 Granbury, TX 76048

Suit Filed Against 'Shoot To Wound' Policy

The American Civil Liberties Union's National Prison Project, based in Washington, D.C., and Reno attorney Donald Evans filed a class action lawsuit in the U.S. District Court on May 16th, 1994 against the governor of Nevada and officials of the Nevada Department of Corrections on behalf of inmates at Ely State Prison (ESP). Attorney Evans already represents a number of individual inmates at ESP.

The lawsuit names Governor Robert Miller, Nevada Department of Prison director Karl Sannicks, and E.K. McDaniel, warden of Ely State Prison, as defendants.

The suit alleges that "an atmosphere of terror and violence" pervades ESP, and results directly from improper training and supervision of correctional staff and failure by defendants to monitor, investigate and discipline misuse of force by staff. "Staff at ESP feel they are above the law," according to National Prison Project staff attorney Mark Lopez, "while the prisoners are without recourse." ESP is located in a remote area 300 miles from any major city, he noted, and, for most family members and attorneys, is accessible only by car. "Because of the staffs isolation," notes Lopez, "they are convinced that they need not obey the same laws the prisoners are subject to. We intend to enlighten them."

The excessive use of force alleged by the prisoners includes "frequent and systemic beatings, the intimidating use of dogs, use of taser guns, chemical gas, electrified batons (cattle prods), nove (electrified) shields, shotguns, and until recently, Ruger Mini-14 assault rifles." Prisoners are frequently beaten and kicked, while in chains or handcuffs, by correctional officers, who also conduct harassing cell and body cavity searches.

The lawsuit also challenges ESP's "shoot to wound" policy. In one case cited, two inmates were involved in "non-life threatening" fight. To break up the fight, four correctional officers shot twelve rounds, four of which came from a Mini-14 assault rifle. The two prisoners suffered extensive injuries from being shot. Inmates also report being shot at for failure to obey orders to disperse, or even for "stepping out of line" on the way to the dining room.

Challenging medical care at the prison, attorneys for the prisoners claim that it fails to meet the needs of the approximately 1000 prisoners. Prisoners are required to pay a fee to obtain medical care, and to purchase their own over-the-counter medications. They must also pay for personal hygiene items, reading and writing materials, postage and phone calls, although most receive no state pay. "Even winter clothing must be paid for by the prisoner," attorneys contend. "Prisoners are therefore forced by payment policies to make a choice between two necessities of life in the institution: medical care or hygienic/personal supplies."

The lawsuit also alleges that the special housing units (condemned men's unit, and disciplinary and administrative segregation) subject prisoners to a system of "terror, deprivation and isolation," and that the protective custody unit is densely populated because prison officials fail to adequately police the prison. Other issues include inadequate access to the law library, lack of proper winter clothing, and visitation hardships caused by prison lockdown policies.

Attorneys for the prisoners ask the court to remedy "the unlawful and unconstitutional conditions that deprive prisoners of basic human needs."

The ACLU Takes Indiana Prison Officials To Court

Mentally ill prisoners shackled to their beds, sick prisoners denied treatment, indigent prisoners forced to pay for medication or do without — these and other deplorable conditions at the Westville Correctional Center have forced attorneys for the prisoners to return to the US District Court to ask Judge Allen Sharp to find the Department of Corrections in contempt of the court-approved agreement reached in 1989.

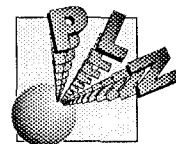
In a case first filed in 1983 (*Anderson v. Orr*), the National Prison Project of the American Civil Liberties Union together with local counsel, successfully challenged the totality of conditions and practices at Westville Correctional Center, the largest prison in Indiana. The prison holds 2,800 medium security prisoners in dormitory-style housing and between 120-180 prisoner/patients in a psychiatric unit which serves the entire state prison system. In the preparations for trial and the extensive negotiations that took place between 1987-89, the main focus of the plaintiffs' efforts was improvement of the appalling psychiatric and medical conditions that existed. At the time of filing, there was no physician coverage at the facility, and treatment in the psychiatric unit was virtually non-existent. As a result, there were no sick call clinics or other means for prisoners to receive medical treatment. Mentally ill prisoners were routinely drugged

and placed in four-point restraints for weeks at a time — a practice uniformly condemned.

The 1989 agreement was supposed to end all that with the establishment of a comprehensive health care service program and sweeping reforms in the psychiatric unit. In the five year's since the agreement, defendants have never fully complied with all the conditions of the settlement and in the last year the level of medical and psychiatric services deteriorated significantly. Instead of providing close supervision and intense treatment, extended use of physical restraints and seclusion continue as the treatment of choice for the mentally ill, with poor monitoring of medication. At the same time, acts of self-mutilation and violent assaults continue almost unabated as patients remain dangerous and unpredictable.

For the general prison population at WCC, the number of psychiatric and general medical staff has not been increased to the levels promised in the agreement. To exacerbate the situation, an obtuse and bureaucratic sick call system has been introduced resulting in 50 - 75% of inmate requests for medical treatment being denied. Prisoners, including the indigent, are instructed to buy over-the-counter medications without any clinical assessment of their condition. "This is not what the prisoners settled for," states the Prison Project's Mark Lopez who negotiated the original settlement. "The prisoners entered into the agreement to ensure that they would be seen and treated by clinically trained medical personnel. Nowhere in the agreement does it state that they must purchase that treatment."

Attorneys for the plaintiffs are particularly concerned about the conditions under which prisoners are being held in protective custody. These men, who are kept apart from the general population, are never allowed outdoor recreation and are only allowed indoor recreation at 4:00 a.m. — timing which seems expressly designed to discourage their participation. The papers filed with the court ask for a Temporary Restraining Order to allow these prisoners outdoor recreation immediately while the court reviews the situation.



From the Editor

By Paul Wright

Welcome to another issue of *PLN*. We apologize to our readers for the delays caused in recent months. Our new printer is working out quite well and as a result we are able to bring you more pages for the same amount of money. In May of 1993 we made the transition from a 10 to a 16 page publication as we had outgrown our 10 page format. With the increase to 20 pages we have doubled in size within the period of one year. Please keep sending us your news and articles, we rely on our readers to keep us up to date on issues and struggles around the world. This in turn lets us keep our readers informed. Sending typed, brief articles is the quickest way to get it into print. With more pages we hope to bring still more extensive and timely coverage of prison issues. If you have any specific questions about article submissions write and enclose an SASE.

PLN has never pretended to be "objective" or "unbiased." Our role is to be a voice for progressive prisoners and their supporters in the prison struggle. That is simple enough. I've always believed that "objectivity" is just another word for pro-government bias. The problem is with the mainstream, corporate media who pretends to be "objective" and "unbiased." I recently had an interesting encounter with this.

A Seattle program, *Northwest Afternoon*, was planning a show dealing with prisoner litigation. Two of the guests were Donna and James Hamm, *PLN* readers from Arizona. James did 17 years in prison, becoming a jailhouse lawyer in the process and is now in law school. Donna is a former judge who met James while he was in prison. They are active in prison reform struggles in Arizona. Donna told the Seattle producers about *PLN* and myself after I sent her a rundown on major, recent Washington prison litigation, (i.e. the ban on cross gender pat searches at Purdy, banning of rectal digital "searches", and more) published and unpublished cases which won or expanded prisoner rights.

I was contacted by one of the show's producers, Jodi Flynn, who asked me about my views on prisoner litigation, *PLN*, etc. She asked me if I wanted to appear on the show and I said I did. She

stated I would appear on the show as well. She also asked for some copies of *PLN*. Well, as they say, that was the end of that! Apparently I'm not TV material. After watching the program, which aired on May 19, 1994, I saw why. They wanted to discuss prisoners suing over peanut butter. To do that they got an AG from Nevada who told about a prisoner suing over getting chunky instead of creamy peanut butter from the commissary four years ago. The Hamms did their best to explain the realities of prison litigation but the show featured the relatives of murder victims who are now constitutional law experts of the opinion that "prisoner's don't have rights" and "what about victim rights?" The all white (at least that was shown on TV) audience was trucked in from the nearest Hitler Youth or Rush Limbaugh rally and of course expressed the appropriate level of outrage. Guess it was just as well that they didn't get to hear about any of the many successful cases litigated by prisoners as reported right here in *PLN*. This bias is typical of that found by FAIR in the article analyzing media crime coverage which we review in this issue of *PLN*.

An interesting point that most people don't seem to understand is what "rights" are. In the US system of law the Bill of Rights is intended to protect citizens from arbitrary government action. Prisoner litigation generally focuses on what the government can or cannot do to prisoners or to compel actions such as provision of medical treatment, etc. These are the same rights that all citizens have not to be overly harassed or repressed by the government. The only difference is that prisoners get the easy, lite version of these rights, with substantial deference to the government. Why prisoner's rights? Well, why citizen rights? That is why there is no such thing as "victim rights." The state is not implicated in injuries caused by citizens preying on each other. That is the province of criminal law. The victims' right is that perpetrators be caught, prosecuted and punished by the state. What more do they want? The Supreme Court has even held that citizens have no "right" to police protection. Essentially all that so called "victim's rights laws" have done is expand the power and reach of prosecutors, i.e. the government,

in being able to admit information that was previously held to be irrelevant or otherwise inadmissible. Cut out from the mainstream media, disenfranchised and poor we are easy prey.

One way you can help counteract this media barrage of disinformation is by telling friends and family members, especially those on the outside, about *PLN*. Encourage them to subscribe so they can be aware of the reality behind the media myth. Eventually the media will move on to other prey and the political climate will change. We'll still be here. We do need financial support from you, our readers to keep on publishing. I don't like to seem like we're always begging for money (like Public Television) but the bottom line is we have printing, postage and other expenses to pay. We rely solely on you, our readers, for funding to publish. We have no corporate or wealthy sponsors. With one paid ad to date we aren't breaking any income barriers. No one at *PLN* gets a salary, your money goes towards what you are holding in your hands so please donate what you can and think about the one third of our readers who are on death row or in control units and unable to make any donation at all. The more money we have the more magazine you get.

Our subscription drive continues. We would also like to ask for donations so that we can pay for the mailing of sample copies to potential subscribers: prisoners and relatives, defense attorneys, law libraries, etc. It costs us roughly \$250 to mail out 1,000 sample copies. We can't afford advertising, and direct mailing to potential/likely subscribers has so far been our best means of reaching people. If you can afford a donation to help us do this please contribute. Please tell other prisoners about *PLN* and encourage them to subscribe. For ten 29 stamps and a mailing label we will send you 26 copies of *PLN* to distribute or pass along to potential readers. Bigger quantities are also available, just write me for details.

We receive frequent inquiries about back issues. We have a few complete sets available, 50 issues, for \$145.00, postage paid. The reason it costs so much is because for the first few years we couldn't afford to print more than the exact number of issues we had readers for. The

result is that to make complete sets now we have to pay for photocopying which is really expensive and a major time drain on our volunteers. We are in the process of indexing past issues. Another project is to make all past issues available in electronic format on Internet. While this won't directly help prisoners wanting copies we can make the information more accessible so friends on the outside can download and print out all past copies and in turn send them to prisoners. This project is moving along. Any outside folks with the necessary computer skills interested in this should contact me for more information. Enjoy this issue.

PLN Suit Filed Against ISRB

By Paul Wright

Readers may recall that former *PLN* coeditor Ed Mead was released from prison in October, 1993, after serving nearly 18 years in prison. The day after he was released he was required to sign a standard conditions of release document for the Washington state Indeterminate Sentence Review Board (ISRB), formerly known as the parole board. Four days later, the ISRB added a new condition: "Do not associate with individuals with prior felony convictions." A similar restriction on Ed's federal parole was interpreted by Ed's federal parole officer to prohibit only direct physical contact with felons. Ed's state parole officer specifically explained that the state prohibition explicitly prohibited direct or indirect contact (i.e. by mail or phone), even through third parties, with felons. This specifically included *PLN*.

On November 14, 1993, Ed filed an administrative request with the ISRB seeking a modification of the restriction so as to allow him to continue working on publishing *PLN*. The ISRB refused to modify its instruction.

The effect of this order were that Ed and I could not communicate by mail or phone to consult on *PLN* related matters. Ed's parole officers have repeatedly questioned him about his involvement with *PLN* and have verbally pressured him to limit his involvement with *PLN*. They have even searched Ed's files and computer disks outside his presence, and questioned his family about his involvement with *PLN*.

On June 1, 1994, ACLU cooperating attorney Frank Cuthbertson, with the Seattle law firm of Davis, Wright and Tremaine, filed suit in United States District Court in Tacoma on behalf of Ed and myself to challenge this crude attempt by the ISRB to silence *PLN* and retaliate against Ed for past critical articles about the ISRB that have appeared in *PLN*.

Among those being sued are Kit Bail, chairperson of the ISRB, the ISRB, and parole officers Richard Cornweil and Clint Weimeister. The complaint alleges that by imposing the no contact ban on Ed and effectively ending his involvement with *PLN* they have imposed a prior restraint of the press on *PLN*. The ban also violates my rights and those of other prisoners to communicate with Ed for the redress of grievances.

That there is no legitimate reason for the communication ban is demonstrated by the fact that when Ed and I first started *PLN* in 1990 we were in separate prisons, he in Monroe, myself at Clallam Bay. There was never any problem with our correspondence. At that time each of us would type half of *PLN* in our respective prison before sending it out to be copied and mailed. In 1992 I was transferred back to Monroe where we lived on the same tier and were able to collaborate on *PLN* until he was released in 1993.

The only reason the ISRB has imposed a no contact prohibition on Ed is to put in place a condition they thought he was unlikely to abide by which would give them an excuse to imprison him again. In an article with the Seattle *Post-Intelligencer* (PI) the ISRB candidly admitted that when they paroled him to his federal detainer they did not expect him to be released for several years. They called their decision a "mistake" while admitting they did not believe Ed posed any threat to society.

We will also be seeking a preliminary injunction and temporary restraining order against the ISRB. As a result of the ban *PLN*, Ed and myself have suffered irreparable harm by being not being able to communicate. This ban has resulted in Ed discontinuing his involvement with *PLN*. The first amendment issues involved include whether the parole condition constitutes a prior restraint of the press and whether the state can lawfully threaten to imprison someone for participating in publishing a magazine.

We will keep readers posted as the suit progresses. It is essential to keep alterna-

tive avenues of communication like *PLN* open where prisoners have no other means of expressing ourselves and all too often are shut out of the mainstream media. Those readers desiring more information can contact Frank Cuthbertson at: 2600 Century Square, 1501 Fourth Ave. Seattle, WA. 98101-1662. (206) 622-3150.

Drug Use Legalized in Colombia

On May 5, 1994, Columbia's Constitutional Court (the equivalent of the US Supreme Court) voted five to four that a 1986 law permitting the arrest of someone for carrying a "personal dose" of drugs was a violation of the country's new constitution. Court president Jorge Arango explained that the penalty for possession of a personal drug dose "was a violation of individual rights and therefore contrary to the constitution." Arango added that the court's decision was made after much discussion and without taking into account the opinion of the United States.

US President Bill Clinton and Colombian President Cesar Gaviria both condemned the court ruling. Gaviria said a referendum and revision of the Colombian constitution should be considered. The court decision is expected to raise tensions between the US and Colombia, already high because of public statements by Colombian Attorney General Gustavo de Greiff favoring sweeping drug legalization; what the US sees as his leniency towards drug traffickers and his intervention on behalf of Dandeny Mufioz Mosquera, a Colombian on trial in the US for allegedly blowing up a Colombian airliner.

De Greiff has defended his position by saying that the war on drugs "has been a failure" and that legalization should be considered. He stated that drug legalization should not come piecemeal or one country at a time, but should be the result of international agreements. "If you legalize it, there will not be any business for the narco-traffickers," said de Greiff. "Consumption will be treated as a public health problem and a massive education campaign would try to dissuade people from using drugs. We should legalize drugs because we here [in Colombia] are providing the dead, and the consumers are there in the US."

Prisoner Dies at Purdy

In the April, 1994, issue of *PLN* we reported *Hallett v. Payne*, a class action suit filed by prisoners at the Washington Corrections Center for Women (WCCW) at Purdy. The suit contends medical care is wholly inadequate to meet the medical needs of prisoners. On May 16, 1994, Gertrude Barrow, a WCCW prisoner died because a hole in her stomach permitted fluids to leak out, causing inflammation and infection. Barrow had been convicted of a narcotics charge with a 31 month sentence; she was due to be released September 14, 1994.

According to an article in the May 18, 1994, edition of the *Seattle Times*, Barrow had sought medical care from prison officials in the days before she died. Her symptoms included the fact that she was in pain, couldn't hold food down and was vomiting blood. She was sent back to her cell. Two days before her death she was admitted to the prison infirmary, and she was not seen by a physician until the day before she died. Prison doctor Christopher Badger had diagnosed her pains as gas, constipation and, after an x-ray, kidney stones. The condition that killed Barrow was a perforated, chronic gastric ulcer with acute peritonitis.

A University of Washington physician familiar with treating such conditions stated that standard treatment would have included placing Barrow in an intensive care unit, taking of blood samples, prescribing powerful antibiotics to fight infection combined with medication to reduce the risk of going into shock. Instead, the only medication Barrow received before she died was a mild, over the counter painkiller.

On April 19, 1994, Barrow had been returned to Purdy from a prerelease center suffering from chills, vomiting and being unable to eat. Despite the kidney stone diagnosis she had received no pain medication. On May 3, 1994, she contacted attorneys at Evergreen Legal Services who are litigating the lawsuit on behalf of the prisoners. Attorney Patricia Arthur wrote to the state attorney general's office about Barrow's condition requesting that she be provided with prompt medical attention. Assistant AG Cheryl Casey claims the letter was forwarded to the prison. Prison spokesperson Kim Shafer

stated Casey had instructed her not to comment on prison officials' inaction.

The plaintiff's attorneys have obtained a federal court order to obtain Barrow's medical records and treatment history. They will continue to investigate her death. Patricia Arthur referred to Barrow's death as a "preventable tragedy. It's really indicative of the problems with the health care system there." Prior to Barrow's death the parties had been in the process of negotiating a settlement to the suit. Negotiations were apparently suspended after this event.

News in Brief

KS: The state legislature enacted a death penalty law that becomes effective July 1, 1994. The law restored the death penalty in Kansas for the first time since 1972 when the US Supreme Court struck down as unconstitutional Kansas' death penalty statute. Governor Joan Finney allowed the bill to become law without signing it, claiming she opposes the death penalty but not enough to veto the law. **CA:** The racketeering convictions of federal district court judge Robert Aguilar was overturned by the ninth circuit court of appeals. Aguilar was convicted in 1990 of racketeering for allegedly trying to influence other judges to be lenient in sentencing his friends. He was also convicted of disclosing wiretap testimony and obstructing a grand jury. Sentenced to six months in prison, Aguilar has remained free on bail during three years of appeals and kept his title and salary, presiding over settlement conferences in federal court, but not court sessions. The decision barred any retrial. **Australia:** Gary Hayes was arrested and strangled unconscious by police in Wembley in 1989. In April, 1994, Hayes stole an M 113 armored personnel carrier (APC) from a military base, drove it to the offices of Wembley's Criminal Investigation Bureau, where he had been abused, and destroyed the offices, a shed and two police cars with the APC. He then drove to the East Perth police headquarters, wrecked six police cars then went on to ram the city's law courts. He then attacked another police station in the same city. While in the process of attacking the local parliament house he was tear gassed out of the tank. Now in police custody Hayes states he has been abused by police. **RI:** The state's former top judge, justice Fay resigned his \$128,500 a year job amidst impeachment threats. To avoid prison, he pleaded guilty to misusing court funds to buy, among other things: an \$11,500 self portrait, a \$38 fruit basket and expensive dinners and then trying to destroy records of the spending. He faced a 25 year prison sentence but received a suspended sentence. **PA:** State supreme court justice Rolf Larsen was convicted on April 9, 1994, of two felony conspiracy counts. Witnesses testified that Larsen had an arrangement with his doctor who wrote prescriptions for tranquilizers, pain killers and antidepressants in the names of Larsen's staff members. Larsen said he needed the drugs to function and was just trying to preserve his privacy. He faces six years in prison but is unlikely to do a day in jail. **WA:** On April 15, 1994, King County Court Commissioner Jack Richey announced his retirement from the \$91,000 a year job after being spotted by courthouse window washers committing a sex act with a female courthouse employee in his chambers. Richey's retirement will be effective Feb. 15, 1995. No specific state law prohibits judges or commissioners from engaging in sexual activities in their chambers but judicial canons require judges and commissioners to "uphold the integrity of the judiciary" and adhere to "high standards of conduct." **UK:** Over 450 locks at the high security Behmarsh Prison in London have had to be changed because the keys have been lost. Prior to this, the plans of the prison turned up in a London dump before the prison opened. An investigation is being launched to determine how the keys became "unaccounted for." The lock changing cost \$200,000. **USA:** The Foreign Intelligence Surveillance Court is the most secretive element of the US judiciary. Meeting in secret, twice a month, in a Justice Department building in Washington D.C., it is the "secret court" which authorizes wiretap and similar warrants for federal agencies such as the FBI and CIA engaging in "national security investigations." The ostensible purpose of the court is to serve as a protection against well publicized abuses by the FBI, CIA, etc. Since it was formed in 1979 the court has received 7,500 requests for wiretaps or other surveillance: and granted every single one! No warrant application has ever been turned down. The only information made public by the court in its annual report is the number of warrant applications received and the number granted.

Prison Psychologist Opens Brothel

While this case has little bearing on prison litigation per se we thought our readers would find it informative and amusing. William Knapp is the Principal Psychologist for the Nevada Department of Prisons. He was fired from his job after initiating and pursuing a venture to open a "western theme-park brothel." He was later reinstated with back pay after an administrative service personnel hearing. However, he was demoted for seeking outside employment.

Knapp filed suit claiming he had a protected first amendment interest in promoting his brothel business. The district court held that Knapp's concerns were primarily economic rather than expressive but still entitled to some constitutional protection. The court ordered the defendants to respond to this finding. See: *Knapp v. Miller*, 843 F. Supp 633 (DC NV 1993).

HIV+ Cellmate Doesn't State Claim

This is yet another addition to the growing area of HIV/AIDS in prison case law. Andrew Marcussen is an Iowa state prisoner. He filed suit claiming prison officials were deliberately indifferent to his safety by assigning an HIV+ prisoner to his cell, thus, he claimed, exposing him to possible HIV infection. Marcussen claims he was subjected to the risk of HIV infection when his cellmate used his razor, drinking cup and cigarette roller. Marcussen has tested negative for HIV.

The district court gave a detailed discussion of AIDS in prison cases. Citing several court decisions on this issue, as well as U.S. Department of Health reports, the court held that, as a matter of law, there is no "pervasive risk" of contracting HIV/AIDS through being housed with HIV+ prisoners. AIDS activists should read this case to be better informed on developments in this relatively new area of prison law. This court ruling joins every other published decision to consider this issue by dismissing the suit. See: *Marcussen v. Brandstat*, 836 F. Supp 624 (ND Iowa 1993).

Prison Overcrowding Crisis Continues, Says ACLU Report

Washington, D.C. - February 14, 1994. Thirty-nine states, plus the District of Columbia, Puerto Rico and the Virgin Islands, are under court order to reduce prison overcrowding and/or to remedy unconstitutional conditions, according to the new Status Report released today by the National Prison Project of the American Civil Liberties Union. In each case, conditions of confinement and/or overcrowding in the facilities were found to violate the ban against cruel and unusual punishment of the Eighth Amendment to the U.S. Constitution. - (See enclosed report summary.)

Since 1982 (the year the Prison Project initiated the report) the total number of states (including D.C., Puerto Rico and the Virgin Islands) under these court orders has increased from 28 to 39. During the same period five states have been completely relieved of federal court supervision and two other states have been relieved of active court supervision.

Overcrowding lies at the root of most of the lawsuits as the population of both state and federal prisons swells by the week. California, for example, holds 110,049 prisoners in a system designed to hold 59,385.

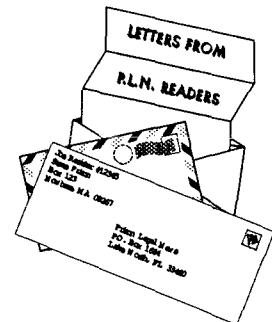
According to Alvin J. Bronstein, executive director of the National Prison Project, "Our political leaders—President Clinton, Congress, state legislators—should review this report. If the political hysteria surrounding the 'war on crime' results in the passage of the 'three strikes you're out' legislation and other harsh sentencing changes, every state system plus the Federal Bureau of Prisons will be under court order for overcrowded conditions within a few years. And crime will continue to go up and down for reasons totally unrelated to how many people are put in prison."

The total number of jurisdictions under court order has decreased by one since last year; the state of Tennessee was released from active court supervision in 1993. However, the number of states with cases pending before the court in-

creased by one—major litigation was filed against the Vermont Department of Corrections by the ACLU.

Copies of the report, entitled "Status Report: The Courts and the Prisons," are available for \$5, prepaid, from the National Prison Project, 1875 Connecticut Ave., NW, Suite 410, Washington, D.C. 20009. Telephone (202) 234-4830, Fax 202.234-4890.

Reader Mail



OH Double Standard

Last year numerous prisoners filed small claims actions for personal property damaged and/or destroyed during the April 11, 1993, insurrection at SOCF Lucasville, Ohio, claiming that the fault was with prison officials whose actions precipitated the riot and further knew or should have known that a riot was imminent and failed to take preventive or other measures to maintain the security and safety of its charges.

After an influx of such claims Court of Claims judge Russel Leach publicly announced that all prisoner claims arising from the April 11 rebellion were without merit and prison officials would not be held responsible. All such suits were then summarily dismissed.

In February, 1994, several prison guards and their families filed suits in the Court of Claims alleging that prison officials were at fault for the riot, that they knew or should have known that a riot was imminent and took no steps to prevent it. Attorneys for the guards stated "this is about truth... So it doesn't happen again." Guards and their spouses are seeking an unspecified amount of damages. Judge Leach has been silent. Another case of Just-Us.

E.H. Lucasville, OH

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The Scandal of Prison 'Management'

By Jill Brotman

Throughout the AFSC's decades of prison work it has encouraged reconciliation and nonviolent alternatives to conflict. But Massachusetts Governor William Weld has declared that a stay in prison should replicate a tour of the circles of hell. Current prison management is supposed to be part of the war on crime. But it is not a war on crime — it is a war on prisoners.

A fundamental principle of American judicial practice is that people are sent to prison as punishment, not for punishment. However, the purity of this idea hardly ever exists in practice. The prisoners most vulnerable to the secondary pun-

ishments of confinement are long-term or lifers. When we talk about how severely we should punish, we always need to distinguish between long-term and short-term punishment. Some may detest the people in our prisons. Nonetheless, when they are old and ill, when they have served 20 years and can hardly be identified as the same individual who committed the crime, when the prison term is the person's life and the prisoner struggles to imbue that life with meaning, punishing takes on a different character.

Then there is a most grave consideration: the culture of punishment and status degradation will eventually spill over onto the rest of us. In the design and implementation of punishment policy we must be vigilant, because whenever we deliberately inflict pain, we deform and diminish ourselves.

Reporters quote the average citizen as talking about sending people to prison and letting them rot, locking them up and throwing away the key. How much and what quality of poor or brutal treatment would be considered acceptable in our prisons? Since the perception that prisoners are not punished enough has been projected so effectively by people who, like Weld, have, for the most part, never been in a prison, this is a serious question.

Should we starve people? Or should we simply not give them enough food, as is happening now in the Massachusetts Departmental Disciplinary Unit (DDU) at Walpole? Should we violate our own laws that place a 30-day cap on total isolation time? (Prisoners may be sentenced by an internal board to the DDU, where there is total sensory deprivation, for periods of up to 10 years.) Should our prisons be places with no rules and no

reasonable expectations, places of mystery and chaos, so that good behavior brings no hope of future decent treatment? Should we blink at administrative punishment based on false accusation? Should we force old men with prostate cancer to urinate on the floor if it is count time and there is no toilet in the cell? Should wives, mothers, and daughters of prisoners have to hand over their used tampons for inspection?

Under the Weld regime, medical and dental services have been cut back. Psychological services are gone. Vocational and education programs have been dramatically curtailed. Volunteers, severely restricted, are in many cases just giving up. Staff considered too 'nice' to the prisoners are fired. Visits are a harrowing experience. Property prisoners purchased at the canteen is being seized. In every realm of prison life, things have been taken away.

There will be a high cost for all of this. A prison run this way is a prison that produces deformed and wounded people. The current practice of punishment in Massachusetts is also a war on taxpayers, because our prisons are factories of vengeance and rage. Their inevitable products are more repeat offenses and more victims of those offenses, and the predictable returns to prison where once again citizens will be paying the rent.

In Massachusetts prison managers lack expertise, education, and training. They operate with a deficit of good sense and an abysmal absence of fair play. How else can we explain the lockdown at Walpole? In the wake of the recent escapes from Old Colony, prisoners with 'poor' profiles were transferred out of Old Colony to Walpole. Many of these were men who had been living on the

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honors block for years. They were 'good inmates,' foolish enough to believe that if they did what they were supposed to do, the Department of Correction would do what it was supposed to do. These model prisoners are now locked down 23 hours a day in the dreadful Phase III at Walpole. Dramas like this are staged specifically to justify the building of a corrections-industrial complex.

A lockdown is the equivalent of a breakdown. Locking a prison down and constantly moving the scandal around the system is the administration's way of throwing up its hands and saying there is nothing that can be done with these folks. That is an inadequate response. Massachusetts has a growing prison population whose mean age is dropping. We'd better do something besides chaining them to their beds.

NJ Prisoners' Resource Center

In conjunction with the New Jersey American Friends Service Committee (AFSC) former prisoners have set up a Prisoner's Resource Center (PRC) to provide services and advocacy for both current and former prisoners in New Jersey.

Among the services provided for prisoners are: assistance with parole plans, letters of assurance for the state parole board, information about available resources for education, vocational training, family services, etc., advocacy on behalf of prisoners and assistance in obtaining representation in civil/human rights matters.

Services for former prisoners include: referrals on how to effectively obtain and utilize community resources like food stamps, clothing, housing, welfare, etc., employment counseling, help in readjusting to life outside prison, substance abuse information and help in obtaining representation on human/civil rights matters.

The PRC's goal is to help both prisoners and former prisoners successfully make it back into society. Projects such as this are important and should be encouraged because they involve prisoners helping themselves. PRC hours are 9 AM to 12 noon, mon-thurs. For more information contact: PRC, 972 Broad St. 6th Fl. Newark, NJ. 07102. (201) 643-3079.

AZ Medical Care Unconstitutional

This lengthy (76 pages) opinion deals with a DOC-wide class action suit filed by Arizona state prisoners challenging the medical and dental care, treatment available for seriously mentally ill prisoners, and unequal medical treatment provided to females compared to that provided male prisoners. District court judge Muecke ruled in favor of the prisoners and ordered extensive injunctive relief.

The opinion sets forth extensive factual findings that give a great amount of detail concerning the provision of health care services in the Arizona DOC.

In its conclusions of law, the court sets forth the relevant legal standard to be used in reviewing prisoners' eighth amendment claims regarding the adequacy of medical care. The court notes that the denial, delay or intentional interference with medical care shows deliberate indifference by prison officials. While courts may consider expert opinions in order to determine constitutional requirements for medical care such opinions do not establish constitutional minimums. Prison officials can be held liable for failing to implement a proper mental health care program or failing to adequately train or supervise their subordinates in medical care positions.

The court held that one of the most significant problems in the Arizona DOC medical and dental care systems was the inadequate number of trained medical staff. The DOC director testified that this was due to the legislature's failure to provide adequate funding to the DOC's budget requests. The court ruled this resulted in delays of treatment which would give rise to a constitutional violation.

The court ruled that security staff have inappropriate roles in the medical care system which included making medical judgements, overruling medical orders and interfering with access to medical care. Such actions can create deliberate indifference to prisoner's serious medical needs.

The sick call system used in the Arizona DOC did not provide ready access to medical care because prisoners had to wait in line for long periods of time and reveal their medical problems within hearing of other prisoners. However, the DOC was revising its sick call procedures to remedy these problems. The court held that the lengthy delays in referrals to outside medical specialists violated constitutional standards where one diabetic prisoner went blind, one waited a month to see a specialist for a serious gynecological problem, and a prisoner with a history of skin cancer waited 16 months before seeing a specialist. The DOC has since implemented a new system intended to resolve these delays and provide continuity of care, especially for chronically ill prisoners.

The court ruled that the Arizona DOC medical/dental care system violated constitutional standards at the time the suit was filed but that the DOC had corrected many of the problems by the time the case came to trial. To ensure continued compliance with minimal standards of care, especially in the event of budget cuts, the court ordered continued monitoring of the medical care system.

Regarding mental health care, the court held that the Arizona DOC lacks a system to identify female prisoners with serious mental illness. It also found that mentally ill prisoners do not receive treatment unless they request it or regress to the point that security staff recognize the illness or place them in segregation for their mentally ill behavior. There is a shortage of qualified staff to treat mentally ill prisoners and programming is

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Mail your submissions of articles, artwork, etc. to Paul Wright #930783, Washington State Reformatory, P.O. Box 777, Monroe, Washington 98272. If you are located in Europe or the Middle East, send financial contributions to Solidarieta Proletaria, C.P. 17030, 20170 Milan, Italy. Readers in Latin America, Australia, Canada and New Zealand can send their *PLN* donations to Arm The Spirit, P.O. Box 6326, Station A, Toronto, Ont., Canada M5W 1P7.

non-existent for the mentally ill. This results in lengthy delays for assessment and treatment of mentally ill prisoners.

The Arizona DOC routinely places mentally ill prisoners in segregation or control units despite testimony by psychiatrists that such lockdowns harm rather than help seriously mentally ill prisoners. Prisoners in lockdown receive no mental health care and remain locked down based on assessments by security staff rather than by medical staff. Psychotropic medication is prescribed, continued and discontinued without face to face evaluations by psychiatrists.

"The court finds the treatment of seriously mentally ill inmates to be appalling.

Rather than providing treatment for serious mental illness, ADOC punishes these inmates by locking them down in small, bare segregation cells for their actions that are the result of their mental illnesses." The lack of funding from the legislature was not a defense to these constitutional violations.

The court also found an equal protection violation because, as bad as the mental health care system was overall, it was worse still for female prisoners. The court ordered extensive declaratory and injunctive relief for the plaintiffs on all counts. See: *Casey v. Lewis*, 834 F. Supp 1477 (D AZ 1993).

Coalition And Prisoners Fight For Better Health Care

San Francisco, March 10, 1994 — Despite a demonstration of over 100 people at the gates of Chowchilla prison on January 29 for better health care, the daily medical neglect and abuse continues unabated. Since the beginning of the year, three women prisoners, two of whom had AIDS, have died at the Central California Women's Facility at Chowchilla (Chowchilla prison).

The recent deaths of Sonja Stapels, Molly Reyes and Jackie Jenkins sparked a public outcry for an immediate, impartial legislative investigation. The Coalition to Support Women Prisoners at Chowchilla called this week upon the State Assembly Committee on Public Safety to begin an immediate investigation into both the deaths and the quality of medical care at the prison. (Last year, the Public Safety Committee's scathing report on medical care at the California Medical Facility at Vacaville sparked substantive changes at that prison.)

Sonja Stapels died on January 2, 1994, of AIDS-related pneumonia and other complications. Stapels was not discovered to be HIV+ until two weeks before she died. Her cellmates tried in vain for over a month to bring her poor condition to the attention of medical staff. She never received any preventive care, monitoring or treatment which may have extended her life. Jackie Jenkins, a woman living with AIDS, became very ill after working with pesticides on the prison farm for nine months. Her cellmates tried

unsuccessfully to get her appropriate care and later, compassionate release. Jenkins was finally taken to a hospital in a nearby town where she died at the beginning of March from Kaposi's Sarcoma and other AIDS-related complications. Molly Reyes suffered an internal organ rupture and was violently vomiting blood all over her cell. She and her cellmates had to scream for over an hour to get any medical attention. Reyes was finally placed in the infirmary and died shortly thereafter.

Unfortunately, death and medical neglect are nothing new to women prisoners at Chowchilla. Women inside often have a 3-4 week wait to see the doctor who is a retired pediatrician with little knowledge of women's health care and no knowledge of AIDS. Guards with an elementary first aid course (called MTA's) dispense medication and diagnose illnesses. The prison administration contends that a gynecologist has been hired. However, none of the women, including those with level 4 (cancerous) pap smears, have seen the gynecologist. Most of the identified HIV+ women live in C yard. Big signs in every yard warn "Beware! There are HIV Infected Inmate Persons in this Facility." What's lacking is real HIV/AIDS education. The only AIDS education has been done by a loose-knit group of women prisoner peer educators organized by an inmate, Joann Walker. The prison refuses to officially sanction or support this program. In fact, Walker has been forced to choose between organizing and peer educating. The prison

first gave Walker a support group to lead and then took that privilege away when she refused to stop talking to the media.

Approximately, a year ago, women prisoners with HIV contacted ACT UP/San Francisco and other organizations on the outside to ask for help in exposing the poor care and abuse faced by women prisoners with AIDS. Joann Walker's organizing inside led to the formation of the Coalition to Support Women Prisoners with Chowchilla on the outside. Walker and other women with HIV formulated four key demands: 1) Quality health care for all women prisoners - hire an HIV/AIDS specialist now, 2) High nutritional diets and vitamin supplements for HIV+ prisoners; 3) Support peer education efforts; and 4) Compassionate release for all terminally ill prisoners!

Walker spearheaded a successful campaign to win compassionate release for Betty Jo Ross, a woman prisoner dying of AIDS-related complications. Walker got over 1,100 signatures on a petition demanding Ross's release. Women prisoners pinned protest notes to their clothing, "Free Betty Now!" Outside, the Coalition organized a phone and fax "zap" campaign to the Director of the California Department of Corrections. Ross was finally released to her family at the beginning of January.

Supporting the four demands of the women at Chowchilla, over 100 people from the Bay Area made the three and a half hour journey to Chowchilla to demonstrate on January 29. Speakers included Yvonne Knuckels, former prisoners and member of Women Organized to Respond to Life-Threatening Diseases (WORLD); Dr. Corey Weinstein of the Pelican Bay Information Project; Crystal Mason of the San Francisco AIDS Foundation; Dorsey Nunn, former prisoner and staff member of Legal Services for Prisoners with Children and Rita "Bo" Brown, former prisoner and member of the Norma Jean Croy Defense Committee. A statement from the women inside was also read. After the rally, demonstrators marched up the road running parallel to the prison. Several hundred women prisoners were out on the yard and saw the demonstration. Members of the Coalition chanted and yelled messages of support for the women inside and released a banner that floated over Chowchilla prison.

The Coalition urges everyone to join the campaign for justice and better medical care. Letters demanding a legislative investigation of Chowchilla should be

Health Care (continued)

sent to: Assemblyman John Burton, 455 Golden Gate Avenue, San Francisco, CA 94103. Cards and letters (stamps too) expressing support for the women inside can be sent to Joann Walker, #W17572, C509-19-2L, P.O. Box 1508, Chowchilla CA 93610. For more information, contact the Coalition to Support Women Prisoners at Chowchilla, P.O. Box 14844, San Francisco, CA 94114; (510) 530-6214.

TB Alert

By David Gilbert

Tuberculosis (TB) is the leading infectious killer in the world. Long considered conquered in the industrialized nations, TB is now making a comeback in the U.S. Prison is one danger zone for this disease which can be spread by airborne bacteria. In recent mass screenings (with the PPD test) in New York State, 1/4 of the prisoners showed positive for exposure to TB. Ordinarily only a small portion of those who test positive, about 10%, will proceed to active TB, and it is only those who are actively sick who can transmit the germs to others. While New York has been particularly hard hit, including with treatment resistant strains, TB is an emerging problem in other prison systems as well.

Prisoners need to be aware of the particular problems of containing the spread of TB in populations with significant incidence of HIV (the AIDS virus). The typical TB screening with PPD tests, while a part of a public health program, is not adequate for finding every prisoner who may have active/contagious TB for purposes of isolation and treatment. Persons with compromised immune systems 1) will often show false negatives on the PPD test and 2) can convert from latent to active/contagious TB very rapidly. In addition, some prisoners don't trust medical staff and will live with possible TB symptoms rather than report to sick call. Adequate screening for active TB requires painstaking and expensive measures.

As a practical matter, the front-line of TB protection for prison populations is adequate ventilation. Bringing in fresh air and exhausting the old, along with good circulation, greatly reduce the risk by diluting the concentration of germs. In some situations, ultra violet lights to kill

the TB germs are also needed. It is impossible to know without an engineering survey just how much the windows have to be open and how adequate the ventilation is. Prisoners should try to see that such surveys are done. In the meantime, prisoners should maximize fresh air and circulation in all buildings. It is much better to put on an extra sweatshirt for the chill than to catch TB.

More information can be found in: *TB Information*. Write to: The National Prison Project, 1875 Connecticut Ave. NW, Suite 410, Washington, DC 20009.

AIDS #1 Killer in FL DOC

According to Florida corrections officials, AIDS is the leading cause of death in Florida prisons and many prisoners are released without knowing if they are infected. Half of the people who die in Florida prisons die from AIDS. Prison officials estimate about 8 percent of that state's 50,000 prisoners are infected with HIV, the virus which leads to AIDS. That is 20 times higher than the infection rate in the general population outside of prisons.

Dr. Charles Mathews, assistant state corrections secretary for medical services, told the *St. Petersburg Times*: "They go back home, and when they go back there they spread the disease. This is not really a prison problem. It's a public health problem." The Florida DOC does not test prisoners for HIV/AIDS unless they volunteer to be tested. Because many don't take the test no one knows for sure how many are infected or how often prisoners infect each other. Each of the 3,000 prisoners entering the Florida DOC each month are tested for syphilis, gonorrhea and tuberculosis, but not HIV/AIDS.

Florida state law prohibits compulsory AIDS/HIV testing. DOC Secretary Harry Singletary said he would not ask the legislature to modify the law because of money. Singletary said testing is more costly than it sounds because new tests will turn up new HIV cases. Infected prisoners have a right to treatment and AIDS treatment is expensive, last year it cost the DOC \$7.8 million.

Florida prisoners receive a booklet about AIDS which tells them to use latex condoms and limit the number of sexual partners that they have. But sex is illegal in prison so condoms are not allowed.

Recognizing that sex goes on in prison a number of groups and individuals favor giving prisoners condoms. Among them: the Florida Governor's Red Ribbon Panel on AIDS and Mathews, the DOC's top health official.

Source: *Palm Beach Post*, May 23, 1994

Researching Medical Deliberate Indifference

By Dude J. Rose

Prisoners have an eighth amendment right to adequate medical treatment. When bringing a claim of inadequate medical treatment, the plaintiff/prisoner must allege and show deliberate indifference on the part of the defendants towards the prisoner's medical needs and treatment.

The Supreme Court has adopted the "deliberate indifference" standard to determine whether officials display the requisite culpable state of mind with respect to conditions of confinement, as well as medical care and treatment of prisoners. See: *Wilson v. Setter*, 111 S. Ct at 2326-27 (1991).

What one must understand prior to bringing a § 1983 action dealing with inadequate medical treatment is, neither accidents nor inadvertent failure to provide adequate medical care constitutes deliberate indifference to a prisoner's serious medical needs. See: *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Also it should be noted that mere negligence does not constitute deliberate indifference. See: *Wilson*, 111 S.Ct. at 2328.

The Circuit courts are unclear as to the requisite degree of subjective intent on the part of prison officials in order to raise an eighth amendment claim. Liability for violations of the eighth amendment has two components, objective and subjective. In a 1992 decision, the Seventh Circuit held, "The objective component is the nature of the acts or practices alleged to constitute cruel and unusual punishment... The subjective component is the intent with which the acts or practices are inflicted." See: *Jackson v. Duckworth*, 955 F.2d 21 (7th cir. 1992).

The Sixth Circuit held: "No deliberate indifference found when no objective evidence presented that prisoner suffered serious deprivation because injuries not serious enough to require immediate medical attention and no evidence presented to

show or prove a culpable state of mind by prison officials." See: *Caldwell v. Moore* 968 F.2d 595 (6th Cir. 1992).

The Sixth Circuit seems to base their decisions in eighth amendment cases on the severity of the objective deprivation in order to decide if the alleged actions of officials support a finding of culpable state of mind. The Eighth Circuit, on the other hand, places emphasis on the subjective component. This requires the prisoner to present proof of reckless disregard by the officials in order to meet the deliberate indifference standard See: *Degidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990).

The Ninth Circuit has ruled that access to medical personnel is absolutely meaningless if they are incompetent to provide prisoners with adequate care. See: *Ortiz v. City of Imperial*, 884 F.2d 1312 (9th Cir. 1989). The Eleventh Circuit, however, has declined to extend a requirement of medical competence to the treatment of HIV-positive prisoners. See: *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991). In *Hill v. Marshall*, 962 F.2d 1209 (6th Cir. 1992), the prisoner was awarded \$95,000 by a jury for injury and distress suffered when prison officials improperly administered a tuberculosis drug, placing the prisoner at high risk of contracting the disease. Punitive damages were proper in that case where the prisoner formulated and proved deliberate indifference to his medical needs — not an easy task.

So we come to the question of what type of claims will actually be proper under the deliberate indifference standard? Deliberate indifference to prisoner's medical needs may be shown, for example, by proving that there are such systemic and gross deficiencies in medical staffing, facilities, equipment, or procedures that the inmate is effectively denied medical care and/or access to adequate medical care. See: *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), cert denied, 450 U.S. 1041, 101 S.Ct. 1759 (1981).

Although incidents of malpractice standing alone will not support a claim of eighth amendment violation, See: *Mandel v. Doe*, 888 F.2d 787-88 (11th Cir. 1989), a series of incidents closely related in time may disclose a pattern of conduct amounting to deliberate indifference. See: *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986). Repeated examples of delayed or denied medical care may indicate a deliberate indifference by prison authorities to the suffering that results out of such delays and/or denials

alleged. See: *Todaro v. Ward*, 656 F.2d 48, 52 (2d Cir. 1977). Grossly incompetent medical care or choice of an easier but less efficacious course of treatment can constitute deliberate indifference. See: *Nurrell v. Bennett*, 615 F.2d 306 (5th Cir. 1980).

You should know that treatment itself may violate eight amendment rights if it involves something more than a medical judgment call, an accident, or inadvertent failure. Prison personnel may not subject prisoners to acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. See: *Estelle, Supra*. The Supreme Court has, declared that such "deliberate indifference" by a correctional system to the serious medical needs of its prisoners constitutes the kind of "unnecessary and wanton infliction of pain" that is proscribed and prohibited by the eighth amendment as it applies to states through the due process clause of the fourteenth amendment. See: *Robinson v. California*, 370 U.S. 660, 66, 82 S.Ct. 1417, 20 (1962). See also: *Gregg v. Georgia*, 428 U.S. 153, 73, 96 S.Ct. 2909, 29 25 (1976).

A prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to a prisoner and fails to respond or intervene on behalf of the prisoner. See: *Young v. Quinlan*, 960 F.2d 351, 360-61 (3rd Cir. 1992). There is deliberate indifference when the state of mind of the officials indicated a recklessness in a "criminal - law sense, requiring actual knowledge of impending harm, easily preventable." See: *DesRosiers v. Moran*, 949 F.2d 15 (1st Cir. 1991).

I hope that I've shed light on this topic that some of you readers out there may find helpful in some manner and to some degree. The issue of medical care for prisoners is a vast and complicated one which always requires a lot of research. It doesn't help much that the circuits all seem to be split on the issue. A good piece of advice is to research the applicable standard relied upon by your respective circuit court for their findings of what may constitute deliberate indifference to a prisoner's medical needs.

Here is a simple, four point summary of the steps required to research and prepare your case: 1) A § 1983 action must allege a violation of federal law(s). 2) A § 1983 eighth amendment claim based upon inadequate medical care must show proof of deliberate indifference by prison officials. 3) be sure the defendant(s) is/was an official acting under color of state law. 4) be

precise about which official(s) committed or failed to do the acts you are alleging. If you have a legitimate claim, and you effectively comply with these four steps and support your claim with the proper case law, especially decisions from your area circuit court, your chances of surviving the state's endless motions for summary judgment are dramatically increased.

One important thing to keep in mind, injuries caused by governmental negligence that have been dismissed upon initial review or simply are not redressable under the constitution may very well be sufficient to state a claim under your individual state tort law. The state code should be the first place you look to see if you actually can take your claim in that direction and forum. One final word of advice and a tactic which I have personally used and found to be strategically beneficial in this area: file grievances and written requests. We are all painfully aware that if prison officials aren't willing to do the right thing, then that's all there is to it. All the grievances and written or verbal requests in the world aren't going to influence their decisions or lack thereof. Generally a properly formulated § 1983 suit doesn't require a claimant to exhaust available state judicial or administrative remedies before seeking federal judicial relief. See: *Bressman v. Farrier*, 900 F.2d 1305, 1307 (8th Cir. 1990), cert. denied, 111 S.Ct. 1090 (1991). But as I said, this is a somewhat complicated issue which will require a lot of tedious research. The smarter litigants I've known at least try to get a good start on those methods of relief prior to the actual submission of their § 1983 complaint.

So go ahead and make the written requests and/or grievances to the proper officials. This tactic, regardless of its actual necessity, will provide you with crucial exhibits which may very well make and prove your case. If by some mere chance the officials do a flip-flop and act upon your grievances and written requests, you may get the proper treatment you should have been receiving and you may very well still have a claim due to the suffering that resulted out of their delay in providing the needed treatment. Not only can you still claim they are liable for their actions (or inaction), they will have basically admitted there was a delay and must now show a good reason why such delay occurred. I wish you all good luck and much success in the struggle we all face.

WA Initiative to Increase Gun Penalties

By Paul Wright

The Washington Citizens for Justice are the right-wingers headed by Dave LaCourse, of the Public Policy Institute in Bellevue, WA; John Carlson, of KVI radio and *Seattle Times* columnist and Ida Ballasiotes, Republican state representative for Mercer Island. [Editor's Note: writing for the *Times* plugging I-593 Carlson referred to it in the third person, neglecting to inform readers that he was the chairman of the initiative and his mother the treasurer. A database search turned up 77 references to I-593 in the *Times* and not once was this mentioned.] In 1993 their main project was to get Initiative 593 on the ballot. Better known as "3 Strikes You're Out" it was passed by Washington voters in 1993 [See *PLN*, Vol. 5, No. 6]. Not content with that, they have a new initiative going. This one is Initiative 159 with the slogan "Hard Time for Armed Crime."

The main purposes of this initiative are to increase the sentences given to criminal defendants convicted of committing crimes with firearms; an expansion of the death penalty statute and elimination of good time for these additional mandatory minimum sentences. It also changes the seriousness level of several offenses that are currently set by the Washington state Sentencing Guidelines Commission, a non-partisan body appointed by the Governor.

If passed into law this initiative would require an automatic, mandatory sentence enhancement of five years for any class A felony; 3 years for any class B felony; and 18 months for any class C felony if a firearm is used to commit the underlying offense. The initiative establishes the following enhancements for the use of other deadly weapons (knives, clubs, rope, etc.) during the commission of a crime: 2 years for any class A felony; 1 year for any class B felony and 6 months for any class C felony. This applies only to first time offenders. The initiative requires that these deadly weapon enhancements be automatically doubled if the defendant is sentenced for using a deadly weapon in any subsequent crime. After that, presumably, it doesn't matter because the defendant would likely be getting life without parole as a third striker. The initiative does not allow any reduction for good behavior, and the enhancement must be served consecutive to any other sentences

imposed. Washington state law now currently allows only a two year enhancement for use of any deadly weapon used during the commission of certain specified crimes.

The initiative would also increase the penalty for current and newly created gun crimes. For example, the current sentencing range for first degree reckless endangerment (discharging a firearm) is 0-90 days. The Initiative would increase that to 15-20 months. Theft of a firearm is currently 0-90 days, it would increase to 12-14 months. Possession of a stolen firearm is currently 0-90 days, it would increase to 6-12 months. It also changes the manner in which prosecutors charge and prosecute crimes by automatically making any and all felony crimes committed with a deadly weapon into the more serious "crime against persons" category, whether or not anyone is actually injured, i.e. display of a weapon. This provision is to increase the likelihood defendants are charged and prosecuted. Its likely effect will be yet more cases going to trial.

In an effort to make prosecutors and judges accountable, the initiative requires a sentencing document be kept for all plea agreements and sentences involving a violent crime and any crime involving a weapon. The document has to include the sentence recommended by the prosecutor, the sentence actually imposed by the judge with the latter's printed name and legal signature. The court and prosecutor shall keep copies. A copy of these documents is to be sent to the state Sentencing Guidelines Commission which will compile a yearly and cumulative judicial record of the sentencing practices of each judge regarding their sentencing practices for crimes involving weapons, violent offenses etc. The Commission is mandated to make a comparison between the sentencing practices of each judge and the standard sentencing range for the specific offense, appropriate offender score and any applicable mandatory minimums. These records must be made public for review in an official published document by the Commission. In Washington state both prosecutors and judges are elected officials and this will likely increase the tendency, already present, to impose longer, harsher sentences, which is the goal of the initiative. Any sentences above or below the standard range will

indicate what the prosecutor's recommendation was regarding the sentence.

Firearms are removed from all current property offenses in order to make them separate crimes with harsher penalties. The definition of first degree burglary is amended to include burglaries of any building where an offender was armed with a weapon or assaults anyone. Currently, state law defines first degree burglary as burglary of a dwelling.

The initiative will also expand the death penalty statute by creating whole new categories of offenses eligible for the death penalty. It authorizes the death penalty for any drive by shootings or where a firearm was discharged from or near a vehicle used to transport the shooter, firearm, or both, to the scene of the crime; and for murders committed "to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association or identifiable group." [Like the U.S. Marines?] It is obvious these provisions are aimed at minority youth who will be targeted as "gang members."

As previously predicted that the next logical step to the "3 strikes" law would be expansion of the death penalty, here it is: anyone who commits a murder in an attempt to avoid prosecution as a "persistent offender", i.e. third striker, is eligible for the death penalty. Last but not least, the offense of residential burglary is added to the list of offenses qualifying for the death penalty in the event someone is killed during its commission.

Readers should note that this is an initiative to the legislature, not to the people like Initiative 593 (3 strikes) was. There are several important differences between these processes. As an initiative to the legislature its backers have until December 30, 1994, to gather the signatures of 182,000 voters. If they gather that many valid signatures the initiative is presented to the state legislature to pass into law in its next session. If the legislature does not pass the bill into law it will be placed on the November, 1995 ballot to be voted on directly by the voters. By contrast, an initiative directly to the people requires that the 182,000 signatures be gathered by early July. By submitting the initiative to the legislators the backers gain several additional months to gather signatures. If they gather the necessary

signatures to submit it to the legislature it is almost a certainty that the legislature will pass the initiative into law.

As a matter of public policy it should be apparent that the harsher sentencing provisions will require an even greater number of prison cells to accommodate the numbers of prisoners who will be remaining in prison longer. A better name for this would be the "Prison Overcrowding Bill."

If this initiative is passed into law will this be the last we hear from Washington

Citizens for Justice? Alas, no such luck. In a letter to a citizen, Dave LaCourse states that their strategy is to target one area of criminal (in)justice each year. It looks like they have found a cash cow that they will milk for all its worth, namely the public's fear of crime. People desiring copies of the initiative should contact: Washington Citizens for Justice, 223 105th Ave. NE, Suite 201, Bellevue, WA. 98004. 1-800-775-3201. Ask for a lot of copies.

WSR Consent Decree Loses S. Ct. Challenge

By Paul Wright

As consistently reported in *PLN*, most recently in the March, 1994, issue, prisoners at the Washington State Reformatory (WSR) have been involved in nearly 13 years of litigation involving prison officials' challenge to the consent decree they entered into in 1981. The decree mandated that prison officials single cell prisoners at WSR in exchange for the prisoners dropping their other claims. The dropped claims dealt with medical care and virtually all aspects of prison conditions at WSR. Within one week of agreeing to a population cap which would forbid double celling at WSR, prison officials began trying to weasel out of it. As previously noted, they have finally succeeded in doing so. The district court ruled that the decree could be dissolved once prison officials complied with the decree and single-celled WSR. In other words, the day they met the decree's requirements in 1987 they were free to do as they pleased as long as no continuing constitutional violations were occurring. The ninth circuit affirmed this interpretation at *Collins v. Thompson*, 8 F.3d 657 (9th Cir. 1993).

In doing so, the ninth circuit deviated from every other court to consider the matter of consent decrees. Consent decrees are contracts entered into between parties to an action. They often require more than the constitution would. This created a conflict between the circuits and was the basis of the prisoners' appeal.

The petition for certiorari, case number 93-1561, was filed with the US Supreme Court in April, 1994. The questions for review were: "(1) Must a consent decree be vacated solely because there is no showing of ongoing constitutional violations at the prison which is the subject of

the decree? (2) Did the Ninth Circuit err when it refused to consider the consent decree language that governs the final disposition of the case and instead interpreted the decree to require that it be vacated once minimal constitutional standards have been achieved?"

On May 31, 1994, the Supreme Court denied the petition seeking certiorari. That the suit was eventually lost was not due to a lack of talent or perseverance by our counsel, rather it was due to the courts' increasing willingness to sanction overcrowding and defer to prison officials, regardless of how legally or morally wrong their position and actions may be. In this case the DOC repeatedly changed its arguments and positions according to their whim of the moment. Doing quite literally anything to weasel out of the lawful agreement they had entered into, which goes to show how much their word is worth.

The practical legal effect is that the *Collins* decree is essentially a nullity now with the DOC free to once more overcrowd the Reformatory. The bad decision on consent decrees given by the ninth circuit will stand for some time until it is either overruled en banc or at some future point by the supreme court. The ninth circuit is now unique in this interpretation of prison consent decrees.

For the past eleven years the litigation has been conducted by Bob Stalker of Evergreen Legal Services on behalf of the WSR prisoner-plaintiffs. He has consistently done an excellent job in presenting the prisoners' interests, both in terms of his perseverance and the skill and quality of his legal representation. WSR prisoners are grateful to Bob's efforts on our behalf over the years to forestall double-celling at the antiquated prison. In

a letter dated June 1994, Bob stated: "While the order does not surprise me, I am, of course, very disappointed.

"Nevertheless, I think that all WSR residents and those others of us who worked on the case should be quite proud of the fact that, in a hostile judicial and political atmosphere, we were able to maintain the population cap for many years. I very much appreciate the help and cooperation I got from all the plaintiffs during the eleven years I worked on the case. I enjoyed working with you and I personally believe that our cooperative efforts made a difference in the lives of countless prisoners." "Again, though the end was not what we wanted, we've had a good run."

Little Diversity in WA State Courts

A survey conducted by the Washington State Supreme Court's task force on diversity in the judiciary yielded not very surprising results. Out of 451 state judges in Washington 95 percent, all but 22, are white. Only three of those 22 are in courts other than King County (Seattle). Eastern Washington, with its substantial Hispanic population has no Hispanic judges.

By contrast, those sentenced for adult felonies (which ranges from theft to murder) in 1993 were 30 percent minorities, according to the state Sentencing Guidelines Commission.

The attitude of many court staffs towards judicial diversity tends to be cavalier. One Eastern Washington court responded to a survey question concerning judicial staff's racial background by replying "Asian", as in "Caucasian".

So far the only result of this survey has been a seminar on work force diversity in the judiciary held by the state's Minority and Justice Task Force. A question not asked in the survey, nor reflected in the felon population report, is the economic background of the state's judges as well as those of all people sentenced for felonies. It is quite likely that such statistics would show all or most of the judges, even the minorities, are relatively wealthy while the vast majority of criminal defendants are relatively poor. It has taken decades for race to become a focus in the criminal justice system, how long before class is raised or even measured?

WA Punishment for Use of Religious Name Illegal

By Dawud Halisi Malik

On January 5, 1978, the superior court of the county of Walla Walla accepted my petition for name change as I had adopted Al-Islam as my religion. On May 8, 1990, I arrived at the Clallam Bay Correction Center (CBCC). I requested that I be acknowledged by my religious name as I gave a copy of the court order decree to my counselor to have the information distributed to whoever needed it. I requested an identification badge change reflecting Dawud Halisi Malik, which was denied by superintendent Neal Brown.

I had several petitions pending in various courts under my Islamic name. The institution was so bold as to reject legal and personal mail sent to me under my Muslim name. CUS Kathy Kaatz was even bolder: she tore up legal documents she had initially notarized because I had placed both names on the legal documents, my slave name of David Riggins in conjunction with my Islamic name. CUS Kaatz's display of arrogance, bias, bigotry and racism was very apparent by her totally unprofessional behavior. She had me escorted from her office and infractioned for questioning her behavior.

The administration at Clallam Bay told me that I could not send out any mail in my Islamic name nor receive any. Should I attempt to mail any letters using my Islamic name I would be infractioned and punished. I was duly infractioned and disciplined by the hearing committee. I spent 40 days in segregation; 30 days on cell confinement and was given 80 hours of extra duty for using my legal religious name. As a result, I filed a 42 U.S.C. § 1983 and § 1985 suit alleging that prison officials violated my constitutional rights by refusing to process mail and documents in which I'd used my legal religious name. The district court dismissed my suit holding that the use of my religious name was not from a "sincere religious belief" and that forcing me to use my committed name was reasonable.

The ninth circuit court of appeals reversed and remanded the case for trial. Prison walls do not form a barrier separating prisoners from the protection of the constitution. See: *Turner v. Safley*, 482 US 78, 84 (1987). Among the rights prisoners possess is the right to the free exercise of religion. See: *O'Lone v. Estate of Shabazz*, 482 US 342, 348 (1987).

The ninth circuit decision agreed with the other circuits that the adoption of Muslim names by converts to the Islamic faith is an exercise of religious freedom. See: *Salaam v. Lockhart*, 905 F.2d 1168, 1170 n.4 (8th Cir. 1990) ("It is common practice for a Muslim to change his name as the Qur'an provides, and the former Anglo name is thought to be a badge of a spiritually unenlightened state and a relic of slavery.") *Ali v. Dixon*, 912 F.2d 86, 90 (4th Cir. 1990) ("The first amendment protects an inmate's right to legal recognition of an adopted religious name.") *Felix v. Rolan*, 833 F.2d 517, 518 (5th Cir. 1987) ("The adoption of Muslim names by inmates practicing that religion is generally recognized to be an exercise of both first amendment speech and religious freedom.")

The appeals court rejected the lower court determination that my religious views were not sincerely held because they had developed over a period of time. The court held I had stated a valid free exercise claim. The court found no legitimate penological interest in preventing me from using both my religious and slave names. They agreed with other circuits who have found this to be "a reasonable middle ground between absolute recognition of the plaintiffs Muslim names and the prison interests of order, security and administrative efficiency." Use of both names has no adverse impact on prison administration or security. "Malik's right to free exercise is violated by any prison regulation to the contrary or by contrary enforcement of an ambiguous regulation."

Summary judgment was improper in this case because there were material facts in dispute. Superintendent Brown claims that I sought to exclusively use my Islamic name. The court noted that my claims focus on not being able to use both names on my mail and legal documents and being punished for attempting to do so. The court held that the evidentiary record supports my assertions. The district court erred by weighing the evidence and finding in favor of prison officials where the matter was disputed.

"Malik's adoption of a Muslim name is an expression of his religious faith. He is entitled to use both his religious and his committed names on correspondence, on legal documents, and in his daily affairs. Whether defendant prison officials violated this right and improperly disciplined Malik is a disputed matter that must be resolved at trial." See: *Malik v. Brown*, 16 F.3d 330 (9th Cir. 1994).

OR DOC Held in Contempt for Retaliatory Transfer

In 1988 Arlen Smith and several other Oregon state prisoners sought judicial review of Oregon DOC administrative regulations in Oregon state courts. Shortly before the briefs were due, Smith, the initiator of the litigation, was transferred to the Nevada state prison system. Upon his transfer Smith was moved without any of his legal or other property. Several weeks later some, but not all, of his legal materials were sent to Nevada. Among the reasons given for the transfer, by the Assistant Attorney General assigned to the DOC, was that Smith's "frivolous lawsuits were taking too much of the staff's time." Realizing that such a motivation was illegal the AG and DOC changed the relevant documents.

Upon his transfer Smith filed a motion for contempt against the DOC alleging that the transfer was retaliatory and designed to interfere with his right of access to the courts. The Oregon court of appeals appointed a special master to resolve legal and factual issues. After extensive hearings the master concluded that Smith was transferred by the Oregon DOC to interfere with his access to the courts and that Oregon State Penitentiary (OSP) officials had destroyed Smith's legal materials found in the OSP law library.

The court of appeals reviewed the master's report and held the DOC in contempt and awarded the statutory maximum \$100 fine. The court held that Smith's transfer to Nevada delayed resolution of his challenges to administrative policies and this delay constituted prejudice. The destruction of Smith's legal records was also held contemptible by the court who characterized it as "the ultimate separation of petitioner from his records." Transferring Smith out of state in order to interfere with his access to the courts was also reason to find the DOC in contempt. This finding was supported by the fact that the DOC later tried to change the reason for the transfer, apparently after realizing that such a reason was unlawful. The facts of this case make it specific to prisoners in Oregon. See: *Smith v. Department of Corrections*, 870 F.2d 254, 126 Or App 721 (Or. App 1994).

MDOC Sanctioned for Ex Parte Contacts with Prisoners in Court Cases

Over eight years ago, lawyers from the Michigan Attorney General's office sent interrogatories directly to prisoners about the *Knop v. Johnson* case without notifying the plaintiffs' lawyers. Judge Enslin entered a protective order on February 19, 1986, and he later relied upon that conduct by the defendant's counsel as one factor justifying a higher award of attorney fees to the plaintiffs' lawyers in that case. *Knop v. Johnson*, 712 F Supp 571, 586 (W.D. Mich. 1989).

In April 1994, the Michigan Attorney General and Department of Corrections sent one of their experts on classification, Jack Alexander of the New York DOC, to four Michigan prisons where he interviewed or tried to interview a total of sixteen male and female prisoners about the classification issues in the case of *Cain et al v MDOC*, No. 88-61119-AZ, a statewide class action case before the Ingham County Circuit Court, Hon. James R. Giddings. The MDOC did not notify the plaintiffs' representatives about these interviews, and Mr. Alexander did not

make clear to the prisoners that he was working against their interests.

The *Cain* plaintiffs moved for a protective order and for sanctions. The court held a hearing on May 9, 1994, and granted the motion. On May 24, 1994, the judge signed an order which directed that the Defendants and those in their employ shall have no contact with plaintiff class members regarding matters at issue in this case without first obtaining a court order or the permission of the plaintiffs' representatives. He also ordered that Mr. Alexander shall turn over to the plaintiffs representatives (1) the names and numbers of all plaintiff class members interviewed by him during April 1994, (2) all notes and reports made by Mr. Alexander concerning those ex-parte interviews, (3) a description of the substance of all those ex-parte interviews. And the judge ordered that any and all evidence obtained through the ex-parte interviews shall not be admissible at trial nor shall it be relied upon by Mr. Alexander in formulating his opinion as to any matter at issue in the case.

with the filthy conditions and lack of adequate air circulation, creates a particular threat for both prisoners and staff from airborne diseases such as tuberculosis. Medical care is grossly inadequate with untrained prison guards determining whether prisoners can see a nurse or physician with the result that serious problems are not diagnosed or treated. Prisoners with chronic diseases are not monitored or treated properly. Mental health care is dangerously deficient. Mentally ill prisoners do not receive proper treatment and are housed in among other prisoners, creating risks for the general population and for the mentally ill who are sometimes taken advantage of and abused. In some cases, staff have beaten mentally ill prisoners who are proving difficult to manage while keeping them handcuffed or shackled to chairs and tables.

The National Prison Project attorneys were originally asked to come to the Virgin Islands by local politicians, journalists and the families of prisoners trying to end the long lockdown. Attorney Mark Lopez says, "Now we have seen the appalling conditions here, we can see that the problems go far deeper than the lockdown. The Bureau of Corrections cannot be allowed to continue to risk the lives and health of the prisoners whose care they are charged with."

Suit Filed Over Conditions at Virgin Islands Criminal Justice Complex

For almost two years, prisoners at Criminal Justice Complex have been locked up for 23 hours a day in overcrowded, filthy, rat and roach infested cells. They are only allowed out for a short period each day to shower and for an hour of recreation twice a week. Cells designed for one person are being used to house four or five, with mattresses on the floor which are frequently soaked by malfunctioning, overflowing toilets. Prisoners eat in their cells, on beds or on the floor. The food is often stale, their drinking water is filtered shower water and is contaminated. There is no running water in the cells other than the toilets, not enough light to read or write by, and the cooling and ventilation systems frequently do not work.

These conditions have brought the National Prison Project of the American Civil Liberties Union Foundation to join with St. Thomas attorney Benjamin Currence in fil-

ing suit on behalf of the prisoners against Governor Farrelly and Bureau of Corrections Directory Aiken and his staff.

In a complaint filed June 20, 1994, the plaintiffs' counsel seek relief from unconstitutional conditions that they claim fall below standards of human decency and deny basic human needs for the 208 men and women, both sentenced prisoners and pretrial detainees, held at CJC.

The complaint describes the serious fire danger to the prisoners who are held on the third floor of a three story building that formerly housed the central police station and holding cells. The only way out in the event of fire is a locked stairway, and no plans for emergency evacuation exist. The electrical system is dangerously defective and exposed electrical wiring is found in some areas that are often flooded.

The extreme overcrowding at the facility increases the risk of transmission of infectious diseases and, when combined

UNICOR Info Wanted

Editor's Note: In the June, 1994, issue of *PLN* we reported on a lawsuit filed by BOP prisoners Joe Mohwish and Duane Olson alleging racketeering and other illegal labor practices by UNICOR. We received the following from Joe.] We would like to hear from federal prisoners who have any past or present knowledge, or can obtain copies of any documentation (such as invoices, quotations, shipping receipts, memorandums, directives, etc.) of UNICOR manufacturing any products for or providing any kind of service or making sales of any kind to any private sector business or any customer other than the US Government.

Thank you in advance for your help. Please circulate this ad to a friend who can help. Please mail copies or correspondence to: Research Project, Box 920474, Norcross, GA. 300192

Suit Challenges Inadequate PD Funding

By Marc Lee

Many lawsuits have been filed throughout this country addressing the problems in indigent defense programs. Although many of these lawsuits have been successful in showing the inadequacies in the indigent defense programs, for the most part they have been unsuccessful in obtaining relief. On May 12, 1994, prisoners at Arizona State Prison in Florence filed a class-action lawsuit which has taken a different approach to the problem (*Ernst v. Symington*, U.S. District Court for the District of Arizona, Dist. Ct. No. CIV 94-0953-PHX-SMM (MM)). The defendants in the lawsuit are Fife Symington, Governor of Arizona, the Attorney General of Arizona, and the Boards of Supervisors for Pima and Maricopa Counties.

Instead of attacking excessive caseloads and workloads of indigent defense attorneys or the quality of indigent representation, as the other lawsuits have done, *Ernst* is attacking only the lack of funding and resources to indigent defense programs. This lack of funding and resources is so serious in Arizona that the indigent defense programs have no choice but to provide constitutionally inadequate representation to the vast majority of defendants. Few defendants are chosen to have their cases properly investigated, researched or prepared. This has resulted in many indigent defendants losing trials which could have been won; accepting plea bargains for outrageously long periods of incarceration (40 to 70 year plea bargains for nonviolent crimes are not unheard of); and completely inadequate appeals. To compound this problem, indigent defense programs also lack the funding and resources to properly

investigate claims of ineffective assistance of counsel for post-conviction relief proceedings. Not only are indigent defendants receiving inadequate representation at trial, but they are also unable to prove it after trial.

Ernst has no pretensions about knowing what amount of funding would assure effective representation. The lawsuit is based on the budgets of Pima and Maricopa Counties which reveal that county prosecutors receive 2 to 3 times the amount of funding that indigent defense programs receive. This relationship is boosted to 6 to 7 times the amount of funding and resources when the services of law enforcement agencies, which the county prosecutors receive at no cost, are added. The lawsuit also does not suggest that the funds and resources of indigent defense programs should be increased to the excessive amount given to the county prosecutors — only that the funds and resources of both sides of the justice system be equal or close. If the county prosecutors continue to receive the excessive amounts of funding and resources, as they do now, the prosecutors will continue to defeat the indigent defendant simply by outspending them.

"While criminal trial is not a game in which the participants are expected to enter the ring with a near match of skill, neither is it a sacrifice of unarmed prisoners to gladiators." *U.S. v. Cronin*, 466 U.S. 648, 104 S.Ct 2039, 80 L.Ed.2d 567. *Ernst* does not ask the court to look at the skill of indigent defense attorneys, or the skill of the county prosecutors, all it asks is that the indigent defendants in Arizona do not continue to be the "unarmed prisoners" as described above.

date for commentaries but the press interest was so high they scheduled an air date of Monday May 16th.

Since July of 1992 as the director of the Prison Radio Project I have been recording and producing Mumia's commentaries for public radio (heard in the S.F. Bay Area on Flashpoints, KPFA 94.1 FM, Wednesdays). In February 1993, I went to Washington D.C. and scheduled auditions of Mumia's demo tape with Gail Christian, Executive Director of Pacifica National Programming and Ellen Weiss, Executive Director of *All Things Considered*. I was accompanied by Jane Henderson of Equal Justice USA. NPR was immediately interested. Ellen Weiss was very impressed with Mumia's work. She said "I am honored, let's make this happen ... my audience needs to hear about these issues, this is a unique perspective... thank you."

NPR offered a producer, an engineer, and a commitment to air the material. Pacifica did not get back to me or pick up the series until the media ruckus hit. It's interesting to note that local Pacifica stations WPFW in Washington, D.C. and WBAI in NYC as well as KPFA have been playing Mumia for years. *All Things Considered* has an audience of 7 million people. It is heard on 490 stations across the US, Canada, Mexico, South Africa, and Hungary.

Mumia Abu-Jamal is an insightful and brilliant analyst of the American condition. He was the minister of information of the Black Panther Party in Philadelphia in 1968 at age 16. As a trained radio journalist, he filed for ATC in 1981 while he was a reporter at WUHY (now WHYY), the Philadelphia NPR affiliate. Mumia won a Peabody, the highest award in public broadcasting, for a report on the pope's visit to Philadelphia that year. He has been on death row for 12 years, having been unjustly convicted of shooting a Philadelphia police officer in December of 1981.

Call NPR at 1-800-235-1212: Demand that All things be considered! Fax, e-mail or Write Bill Buzenberg, VP, NPR News at (fax 202-414-3329) 635 Massachusetts Ave. NW, Washington DC 20001-3753. For more information, contact: Noelle Hanrahan, Prison Radio Project 415-648-4505 or write 2420 24th St. San Francisco, CA 94110.

Help Get Mumia Abu-Jamal Back on the Air!

By Noelle Hanrahan

Sunday May 15th, 1994: *The New York Times* ran an AP article "From Death Row: A Radio Show" highlighting the next day's premier of Mumia Abu-Jamal's radio commentaries on *All Things Considered* (ATC). Most major dailies ran the article. That same day, NPR News Managing Editor Bruce

Drake (who was left in charge while his boss was on vacation) stunned NPR weekend staff by single-handedly—without editorial consultations—canceling the debut. This was after NPR had selected, recorded, and launched a nationwide publicity campaign highlighting the debut of these "unique" commentaries. In fact, NPR does not usually set an air

Oppression on the Rise in Arizona

By O'Neil Stough

Arizona has joined the ranks of many other prisons nationwide where oppressive and tried-and-failed barbaric methods of the distant past are being re-instituted.

Governor Fife Symington, up for reelection this year, and Director of Corrections, Sam Lewis whose experience is in law enforcement and kowtowing, both with no experience in corrections, have spearheaded the drive to make the Arizona prison system an environment of suffering, rage and cruelty.

At a recent Republican fund raising dinner, Symington, with Lewis in the wings, announced a new "get tough" program. Regarding one of the facilities being planned, Symington bragged of the cruelty, "It will be a hellhole no man will ever want to go." Lewis boasted later that "troublemakers" (guess who defines that?) will be forced to perform hard labor in the hot Arizona desert without benefit of tools. "They will literally be breaking rocks with their bare hands," Lewis stated. Such "leadership" from the top has given rise to an increase in threats and abuse of prisoners by guards who perceive the "get-tough" philosophy as a green light to act out their basest hostilities.

Lewis has consistently demonstrated he has little regard for the suffering and abuse of prisoners. He has further shown little understanding of law other than the street cop mentality of using power and brute force, rather than reason or intelligence, to operate the prison system.

He is facing no less than two contempt of court violations for refusing to obey court orders aimed at the prisons. At a recent hearing regarding the *Casey v. Lewis* case designed to provide, among other things, proper law libraries in the state's 29 institutions, and access to the courts, his demeanor was defiant and smug. He acknowledged he told staff not to worry about any fines that might be assessed against them for contempt for refusing to follow court orders in *Casey*. He informed staff any fines would be paid by the state.

During the hearing, Special Master Dan Pachoda, assigned to conduct the hearing, said that Lewis was being "contemptuous" and reminded the prison director that he, not Lewis, was running the hearing.

In a separate contempt hearing, Lewis was severely scolded by the Court for attempting to impose an adult magazine

ban. Any magazines which showed exposed breasts, whether *Playboy*, *Easy Rider* or *National Geographic*, were slated to be taken in a massive shake-down, and forever banned. This action was in direct defiance of the 1973 *Hook* decree which affirmed 1st Amendment rights to receive such publications. Attorney John P. Franks, on behalf of plaintiffs in *Hook*, called Lewis a "tinhorn dictator." "I've never seen a grosser defiance of the federal court in all my life," stated Frank to U.S. District Judge Carl Muecke. Three days before the ban he was forced to rescind the directive. He has vowed to reverse the 1973 ruling.

Lewis recently took hot pots, and the foodstuff for them, from the inmate store. Other store items, not only those for hot pot use, have been severely reduced. From a list that was once four pages long, it is now one page. Prisoners in large numbers now go hungry, and irritated, between sparse prison meals.

Also banned is personal clothing prisoners could obtain with their own funds such as t-shirts, underwear, socks and blue jeans. Now only used and/or soiled state-issue of these very same items is allowed and at a cost to the taxpayer.

Fans, which prisoners bought or family sent them, were also recently banned. In the intensely hot and humid conditions of Arizona, fans are needed ventilation in many of the state's institutions where ventilation is poor, at best.

Following this, CD players and tape recorders were banned. Any radio with a cassette player taping capability is now not allowed. This poses a tremendous strain on those who are illiterate (roughly 72%), whose only means of communication with family was a correspondence tape.

Bills have been taken before the legislature to charge prisoners for medical care and one bill, which failed, sought to charge prisoners for electricity. For the few who have jobs, the average pay is 20 cents an hour.

The system is destined to reach epidemic overcrowding as the new "no parole" law took effect in January, 1994. Anyone sentenced after then must serve 85% of a mandatory sentence before consideration for parole. Another parole related law now in effect mandates that a parole panel must vote unanimously, not just a majority, for parole or it is denied.

Under Lewis, halfway houses have been closed and most all programs which aided a prisoners rehabilitation or reintegration into society have either been discontinued or severely cut back.

The claim by Lewis and Symington are that these so called "get-tough" measures somehow deter crime or criminals. No data whatsoever, past or present, supports this supposition. Quite the contrary, ill treatment breeds ill behavior.

Some ranking staff have resigned in protest at the barbaric and cruel policies being implemented. Escapes are rising in response to intolerable conditions, hunger strikes have taken place and the early signs of mass protests, and revolt, are emerging. Human suffering in a barren and desolate environment breeds hostility and rage. Sooner or later it will seek expression such as the massive riots of the late 1960's and early 1970's in prisons nationally; a fact Symington and Lewis obviously lack the experience to understand.

While such tough talk and actions sounds good to a fed-up public in these troubled times, it rings hollow. It is counterproductive, dangerous, expensive and a waste of hard-earned tax dollars. More prison cells do not a safer community make. And, for those who occupy those cells, harsher and tougher policies and restrictions do not reform, but rather, deform.

FBI Heroin Dealer

FBI agent Kenneth Withers stole one hundred pounds of high quality heroin from FBI evidence lockers and then sent mail solicitations with a one ounce sample packet of heroin, to drug dealers whose names he had acquired from FBI files. Withers, a seven year FBI veteran, instructed drug dealers to call him at a pager number and then asked them to send money, \$75,000 per kilo, to private postal boxes in South Jersey. In his mail solicitation Withers offered drug dealers "unlimited quantities" of high grade heroin without prior payment and at half street prices. The FBI was tipped off to the scheme by drug dealers who received the offer. Withers was fired and then arrested in his FBI office. Apparently he had already made \$75,000 on his idea.

Source: *Seattle Times*, June 4, 1994

Crimes Against Habeas Corpus

By Susan Blaustein

With its myriad new death penalty offenses, "three-strikes" provisions, mandatory minimums and moneys for prisons and police, Congress left only one thing out of its much-vaunted new crime package: any protection for Americans' most basic constitutional rights. In their poll-driven stampede to look tough on crime and improve the safety of the streets, members of Congress have once again compromised the safety of our individual liberties by voting to strip from both House and Senate versions of the crime bill all provisions aimed at safeguarding the right of habeas corpus.

In recent years habeas corpus has been threatened by a battery of Supreme Court decisions that have systematically narrowed prisoners' access to the federal courts. The provisions in the crime bill would have corrected the most egregious of these rulings, thereby restoring the historic balance between states' and individuals' rights in reviewing criminal convictions. Many constitutional scholars and lawyers and some Democratic legislators believe it is the duty of Congress — which first incorporated habeas provisions into Article One of the Constitution in 1789 and has been responsible for its oversight ever since — to make sure that the current Supreme Court does not jeopardize those essential rights habeas corpus was designed to protect.

Although most habeas petitions are filed by ordinary prisoners, the vast majority of these never make it to federal trial. It is the relatively few petitions filed by death-row inmates that are far more complex, expensive and time-consuming to litigate. Because so many capital defendants are assigned incompetent lawyers and are convicted in seriously flawed trials, an astounding 40 percent of habeas corpus petitions have resulted in reversals of convictions or new trials, according to a recent study by the American Bar Association. Figures like this one, coupled with tales of horrific crimes perpetrated by repeat offenders, have led many outraged and fearful Americans to believe, erroneously, that convicted murderers are regularly being freed on technicalities.

Eager to streamline the appeals process and to shorten the average eight-year time lag between conviction and execution, in the past five years alone the Su-

preme Court has issued more than a dozen rulings that have severely limited the number and scope of claims inmates may bring to federal courts. One line of decisions now precludes death-row inmates who have completed their first round of appeals from benefiting from any new Supreme Court ruling. This not only encourages delays by effectively penalizing inmates who diligently pursue their appeals; it also results in a fundamental unfairness in the application of the death penalty. For example, the same 1993 Supreme Court ruling that would render one man's 1994 death sentence unconstitutional would spell no relief for the inmate with identical claims whose conviction became final in 1992. The former might be granted a new trial; the latter, an execution date. Another landmark opinion, *Brecht v. Abrahamson*, written last year by Chief Justice William Rehnquist, shifted the burden of proof in federal habeas proceedings from the prosecutor to the prisoner, who must now demonstrate that he could never have been found guilty had there not been a constitutional violation at his trial — an almost impossible standard to meet. With this ruling the Court effectively lent its seal of approval to coerced confessions, the failure to inform prisoners of their right to counsel and the suppression of exculpatory evidence by prosecutors or police, so long as additional incriminating evidence exists. In *Herrera v. Collins*, perhaps the most shocking decision issued last year, the Chief Justice held that a condemned person whose appeal is based solely upon strong new evidence of his innocence is not entitled to a federal court hearing. The ominous formulation that one might be innocent but nevertheless may be executed because one's trial has been deemed constitutionally correct is the latest Orwellian twist in the Court's recent habeas jurisprudence.

Still another series of cases, originating in a 1977 Rehnquist opinion, have deprived inmates of federal court review when their lawyers have made mistakes. In 1991, for example, Justice Sandra Day O'Connor held that Virginia death-row inmate Roger Coleman would not be allowed to present new evidence of his innocence because his attorney had been a day late in filing Coleman's habeas petition. Coleman was executed. Appar-

ently, in the High Court's view, punctuality takes precedence over possible innocence.

"The public thinks the defendants get off on technicalities," says veteran capital defender David Bruck. "But the truth is, defendants are being executed on technicalities, due to the thicket of procedural obstacles in habeas rulings by the Supreme Court."

The habeas provisions proffered by the House Judiciary Committee would have eliminated some of those new procedural obstacles and enabled inmates to have their day in federal court without being able to abuse that privilege by repeatedly filing last-minute, specious appeals. Most important, given what both sides acknowledge is the often deplorable quality of defense counsel in capital cases and the extraordinary complexity of habeas litigation, the provisions would have created a mechanism for assigning experienced attorneys both at the trial level and for post-conviction appeals.

But the 103rd Congress, caught up in heated debate over the horrors of violence and the virtues of capital punishment, was keener on eliminating inmates' weightlifting equipment and federal college education funds than on bolstering prisoners' rights — particularly with state prosecutors jamming members' fax machines with hyperbolic warnings that "to vote for the euphemistically entitled habeas 'reform'... is to vote to end the death penalty."

Lest they be accused of "coddling criminals," House Republicans in particular strove to outdo one another's rhetorical brandishes in denouncing the Democrat-led Judiciary Committee's measures.

"How can anyone explain to the American people," queried Representative Charles Canady, "that we should grant convicted murderers on death row more opportunities to delay the execution of their sentences, more opportunities to thwart justice — and more opportunities to torment the families of their victims? Let me tell you, the people will not buy it."

Judiciary Committee leaders countered that their habeas provisions did precisely what the critics wanted. "This is real streamlining," insisted Representative Don Edwards, chairman of the

Subcommittee on Civil and Constitutional Rights, which drafted the measures. "It takes care of these endless delays; it provides for counsel: It is a real reform."

But Representative Henry Hyde, the ranking minority subcommittee member, masterminded a successful campaign to have the entire habeas package, including the counsel provisions, deleted from the larger House crime bill. "This year it is the considered judgment of law-enforcement professionals to just leave habeas out," Hyde explained, when asked why he decided not to offer his own more limited substitute for Edwards' reform package. "They want several of the things that are in this bill, and they fear that habeas might torpedo the whole [crime] bill, the way it did in the last two Congresses." In mid-April the bill's habeas provisions, as Edwards quipped, "were executed" on a vote of 270 to 159.

Civil rights advocates and constitutional law experts were disappointed by House members' apparent allergic reaction to what Boston University law professor Larry Yackle called "an extremely modest and balanced and fair reform package."

"I would have thought they would have struck a balance," Yackle said. "If you extend the reach of criminal sanctions, you would want to do something to make sure the procedural machinery for protecting rights would be maintained."

"Basic issues of individual rights get lost in the hysteria," said habeas specialist Bruck. "If the House had to vote on the Bill of Rights itself last week, it would have lost by a good margin." Last fall Senate Judiciary Committee chairman Joseph Biden cut his even more controversial habeas provisions out of the Senate crime bill for similar reasons. "We couldn't get it passed," Biden admitted recently in a television interview. "We should leave it for another day; we should help the police with another 100,000 cops."

This sacrifice play by both houses of Congress was echoed by the President and Attorney General Janet Reno, neither of whom supported either the habeas provisions or the Racial Justice Act (RJA), another controversial measure in the crime bill that would allow death-row inmates to use statistical evidence of discrimination to challenge their sentences in court. After habeas's defeat the White House — apparently aware that it had inadvertently alienated Congressional

Black Caucus members through its efforts to court conservatives by not backing the bill's most liberal measures — finally mustered some political will. It was able to do some last-minute lobbying for the RJA, which ultimately squeaked by in the House on a 217-to-212 vote, but the bill still must clear a hostile Senate to be included in the final package. [Editor's Note: The RJA was not in the final crime bill.]

The scars left by this epidemic of political expediency extend beyond the gaping absence of habeas protections in yet another crime bill. By abandoning habeas corpus to the ravages of the current Supreme Court, both the legislative and executive branches of government have, by default, endorsed the High Court's draconian agenda on habeas reform, thereby weakening the separation of powers. The entire apparatus of the state is now on record that individual rights rank well below the rights of states to preserve their convictions and the call for speed and finality in executing criminal judgments, in such a climate, a person wrongly convicted hasn't got a prayer

Reprinted from *The Nation*

Recidivism Revisited

Michigan's corrections department recently released a five-year study of its paroled prisoners that reached the same conclusion as a similar six-year Louisiana study released last year: 55.2% of Michigan's 1986 parolees never returned to prison (nor did 56% of Louisiana's 1987 released prisoners).

5-year follow-up study on first-time Michigan parolees released in 1986

Offense	% Success	% Failure
Homicide	71.1	28.9
Sex Crimes	70.2	29.8
Drugs	65.2	34.8
Weapons	60.3	39.7
Assault	59.1	40.9
Robbery	53.3	46.7
Larceny	50.0	50.0
Auto Theft	49.5	50.5
Forgery	47.3	52.7
Burglary	45.3	54.7

3,574 released

1,973 parole discharges (55.2%)

1,601 parole violators (44.8%)

Source: The MCF Factor (Michigan)

These two studies debunk the popular myth that 70-80% of ex-cons return to prison. They are the latest to examine how people fare who were actually released from prison, providing sound data as to how many and which ex-cons pose a significant threat to the public.

Earlier studies by the U. S. Justice Department — "Prevalence of Imprisonment" (1985) and "Recidivism of Prisoners Released in 1983" (1989) — reached the same conclusions: Most ex-cons do not return to prison and the best risks are those who served time for violent crimes, especially murder. Apparently, the public perception "once violent, always violent, lock 'em up forever" is baseless. But, as a result, thieves and drug offenders shoot through the system too fast for it to have any effect, while many once-violent criminals are held past the point when they could safely be released. A poor ordering of priorities.

Statistics Under Attack

F.B.I. Director Speaks out in Support of DNA Profiling

By Dale Gardner

The method used by the FBI to calculate the frequency of a DNA match has been questioned in a recent paper. It is reported that the FBI calculates match probability based upon a database of large pools of "Caucasians" or "Blacks". In an article in *Science*, Volume 254,1745 (1994), two geneticists contend that more fine tuning of the database is needed to adequately reflect efforts of genetically differentiated subgroups. For example, it is claimed that there is a higher probability for a chance match of a Polish American with another Polish American than would be indicated by the larger "Caucasian" Database. The FBI Director has vigorously defended the FBI approach as reliable and acceptable for use in court.

A study of DNA profiling by the National Academy of Sciences, due for release within the next month is expected to address the issue of population genetics (just as it did with voice identification, this report should have a major impact on the presentation of DNA evidence in court.)

Prisoner Unrest in Georgia

By A Georgia Reader

On Sunday, June 19, 1994, prisoners at Hancock Correctional Institution in Sparta, Georgia revolted in one of the worst prison riots in Georgia history. Damages were estimated at over one million dollars. Establishment media reports erroneously blamed the disturbance on "faulty showers". In fact, captors at Hancock had forced prisoners at the 900 bed facility to go without running water for more than two days prior to the incident. Prison administrators offered no official explanation for the water cutoff, nor was there any attempt made to calm prisoner unrest during the weekend-long water shortage.

Problems began on Friday afternoon when water service to the prison's dormitories was turned off and prisoner sinks, toilets, showers and drinking fountains ceased to operate. Interestingly enough, water flow continued without interruption to utility rooms adjacent to each dorm and to the prison's kitchen. On Saturday afternoon water was delivered to the dorms by the prison fire truck, one bucket per room, for flushing toilets. Occasional deliveries of ice and drinking water were made to dorms through Sunday morning. The deliveries then ceased. Early Sunday evening ice chests containing dirty, foul-smelling water were delivered to the dorms for drinking. Immediately afterward, guards began emergency lockdown of Hancock's population. Prisoners resisted, the guards fled, and the uprising spread.

The Hancock disturbance raged for over four hours. Prisoners held the prison until after midnight Sunday, with three guards requiring hospitalization. Fires were set at various locations, including laundry hampers, yards and the gymnasium. The prison store and fast food training center, were destroyed, as were all dorm televisions, VCR's and control consoles. The water supply was miraculously restored just minutes before riot squad personnel entered prisoner areas and regained control.

Hancock officials deny any responsibility for the unrest leading to the June revolt, despite their failure to communicate the reason behind the water shutoff. Counselors blamed a lightening strike at the prison water tower, although local radio broadcasts reported a countywide water outage. Whatever the actual cause, Hancock's water tower had capacity to furnish water to the prison via gravity feed for an extended period of time.

The Hancock uprising was Georgia's third major prison incident in less than a month. A prisoner work strike at Rivers Correctional Institution in Milledgeville resulted in the transfer of 250 prisoners to other institutions in early June. A subsequent disturbance at the Georgia State Prison in Reidsville caused the hospitalization of two maximum security guards and the lockdown of the entire prison. Hancock's programs were suspended, and the lockdown is expected to be lifted gradually over a period of time.

It should be noted that a tense atmosphere has existed in Georgia's prisons for several months. Governor Zell Miller recently joined the 'get tough on crime' bandwagon, making the prison system a whipping boy for his re-election bid this year. Miller successfully introduced a crime bill in Georgia's 1994 legislative session, mandating 10 year no-parole sentences for first convictions of "violent crime", including most sex offenses. Under Miller's plan, second convictions would be punishable by mandatory life without parole (a "two-strikes" law!). The Miller crime bill was signed in April and awaits a November referendum to become law. In the meantime, anybody with even one prior felony conviction may want to drive around Georgia when traveling. For many, Georgia's tourism slogan, "Stay and See Georgia" could become a chilly reality.

Lucasville Riot Tab \$34 Million Plus

The 11 day rebellion at the Southern Ohio Correctional Facility (SOCF) in Lucasville, OH, which began on Easter day, 1993, left cell block L in ruins. So far it has cost the state \$19.2 million to repair cellblock L alone. It cost \$32.5 million to build the entire maximum security prison in 1972.

The \$34 million dollar tab to date, cited by state officials, includes costs such as the special prosecutors hired to pursue rebellion related criminal cases; the purchase of tear gas, gas masks and body bags; court costs, etc. This figure does not include the potential awards of damages to the guards and prisoners who have sued the state for injuries resulting from the rebellion.

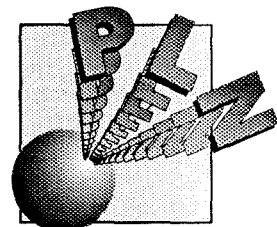
AIDS In WA DOC

Beth Anderson, health services administrator for the Washington DOC, said that since 1985, 7,604 WA DOC prisoners have been tested for the HIV virus and 135 have tested positive. Currently, the DOC claims there are 63 HIV positive prisoners in custody, with 38 not yet showing symptoms of AIDS. Since 1985, nine prisoners have died in state custody of AIDS.

In response to this, the Governor's Advisory Committee on HIV-AIDS is in the process of holding hearings to make recommendations to the governor on how best to contain the spread of AIDS/HIV within the state's prisons. Current Washington DOC policy does not allow prisoners to have or receive condoms except for Extended Family Visits. Homosexual behavior is punished as a major rules violation.

Tim Hilard, a former television newscaster who was recently appointed to the panel, told the committee on June 14, 1994, that he will strongly urge the Lowry administration to lift the ban on condoms in prison. DOC boss Chase Riveland said he would consider changing the policy if the number of HIV cases grow. There is no forced or mandatory HIV/AIDS testing in the Washington DOC unless a prisoner is accused of biting or attacking a person and there may be cause to suspect the prisoner may have infected the other person. AIDS prevention and awareness classes range from poor to non-existent depending on the facility.

Currently, city jails in San Francisco, New York, Philadelphia and Washington D.C. and the state DOCs in Vermont and Mississippi issue condoms to the prisoners in their custody. Phyllis Little, of PO-CAAN's People of Color Against AIDS Network) corrections program believes that condom distribution should not stop at the prison gate. "They (prisoners) have a double risk, with sex and possible needle sharing." "It's the only population where you can find so many persons congregating who are at risk."



How To Win Prison Disciplinary Hearings

Reviewed by Mark Cook

HTW is a manual for federal prisoners written by former federal prisoner Allan Parmelee. This gives the manual integrity from the git go but keep in mind that the undercurrent directions of how to beat a valid "shot" (rule infraction) should be taken with a grain of salt and a good sense of humor.

Parmelee gives detailed and positive directions on how to proceed with mandated due process rights to the best advantage. But one shouldn't rely solely on Parmelee's analysis of the law. Prisoners should research the law thoroughly as it is constantly being changed by the courts. For example, Parmelee incorrectly advises that prisoners have fourth amendment rights in regard to cell searches. The supreme court held otherwise in *Hudson v. Palmer* in 1984. But hey, if a dude can slide by the Disciplinary Hearing Officer (DHO) with such a claim, that is cool, but don't try to lay that on a court of law if court litigation is needed. [Editor's Note: this section has since been corrected.]

The manual correctly stresses the importance of establishing a sound case with evidence and witnesses if a dude loses at the administrative level and needs to go to court.

"Appendix A" in the manual provides information that is amended administratively quite frequently. It can be relied on as a rule of thumb but the information in this appendix will not remain accurate as time passes.

"Appendix B", regarding drug and alcohol shots is interesting and presents some tongue in cheek humor. It would be advisable to check with local jailhouse lawyers as to the reliability of this information.

The footnoted authorities and resources give the manual legal credibility, but keep in mind that the law is in constant change. HTW is recommended as a must resource for federal prisoners and federal prison law libraries. The manual costs \$3.00, postage paid. Order from: Allan Parmelee, 2802 E. Madison, Box 168, Seattle WA 98112.

Reviews

By Paul Wright

North Coast XPress is a magazine for people who care about Constitutional issues, U.S. foreign policy, the criminal "justice" system, labor news, animal rights, global and domestic economics, the environment and other topics that the mainstream media won't touch. Each issue has prisoner art, poetry, and articles in the "Voices from prison" section. Recent issues have contained articles on AIDS, Hemp legalization and products, rethinking the war on drugs, the Pelican Bay trial, class justice and more. Subscriptions are \$10 a year for prisoners (stamps accepted), \$12 for others. Free to prisoners on death row or control units. Write: North Coast XPress, P.O. Box 1226, Occidental, CA. 95465.

Shut Them Down is the bi-monthly newsletter of the Colorado Coalition to Shut Down Isolation Prisons. Their primary campaign has been against the federal government's plans to open a new control unit prison, to replace Marion, in Florence, CO. Each issue contains information concerning prison activism, control units and more. Subscriptions are \$10.00 a year from: Rocky Mountain Peace Center, P.O. Box 1156, Boulder, CO. 80306-1156.

Pelican Bay Prison Express is the bi-monthly magazine of the Pelican Bay Information Project, an independent citizens group formed to monitor conditions and abuses at the Pelican Bay prison in California. This is an excellent publication filled with information of interest to prisoners and activists across the country. The latest issue had extensive coverage of the federal trial in *Madrid v. Gomez*, the class action suit challenging conditions at the control unit at Pelican Bay. This suit is the first to come to trial challenging the conditions and philosophy of control units. PBPE provides far more extensive coverage on this and similar issues than *PLN* can. Highly recommended. Subscriptions cost \$10.00 per year. Write: PBIP, 2489 Mission St. # 28, San Francisco, CA. 94110. (415) 821-6545.

National Liberator is a bi-monthly newsletter published by the Aleph Institute and bills itself as the "Newsletter of life for America's imprisoned Jews." The most recent issue has

articles on Judaism, prison reform, sentencing reform, religious freedom in prison, political developments in the BOP and more. NL contains information of interest to non-Jewish prisoners as well as Jews. Subscriptions are free to prisoners and their families, \$18.00 a year for others. Write: The Aleph Institute, P.O. Box 546564, Surfside, FL, 33154-0564.

Lifelines is the bi-monthly newsletter of the National Coalition to Abolish the Death Penalty. Each issue contains up to date information on abolitionist activities around the country, resources available, book reviews, and plenty of other information. Subscriptions are free to prisoners, \$25.00 a year for others. Write: NCADP, 1325 G. St. NW, LL-B, Washington D.C. 20005.

Action Update is a bi-monthly newsletter published by the Quixote Center. Their main focus is on anti-death penalty activities, especially the case of Mumia Abu-Jamal, the former Black Panther now on death row in Pennsylvania. Each issue contains updates on Mumia's situation, abolitionist activities around the country and prison developments in Pennsylvania. Subscriptions available for a donation. Write: Equal Justice, P.O. Box 5206, Hyattsville, MD. 20782.

Walkin' Steel is the tabloid newspaper of the Committee to End the Marion Lockdown. Each issue is filled with information about control units and efforts to shut them down across the country. The latest issue has an article on the "crime of black imprisonment" comparing the incarceration rate of blacks and whites [*personally I believe this is a flawed analysis. Prisoners as a rule are poor, regardless of race, there are few if any rich blacks or whites in prison. That more blacks and Hispanics tend to be poor does lead to more of them being in prison but I think it is simplistic to say it is a racial problem, I believe it to be a class problem.*]; the new federal control unit prison at Florence, CO; why control units exist; efforts to stop the building of one in IL; and struggle in IN control units. Each issue is highly informative and an excellent resource. They always need money to carry out the many prison projects they are involved in. They also sell T-Shirts. For information send a donation to: CEML, P.O. Box 578172, Chicago, IL. 60657-8172. (312) 235-0070.



From the Editor

By Paul Wright

Welcome to another issue of *PLN*. As we reported last month, the ACLU has filed suit against the Washington state parole board over their no-contact parole condition on Ed Mead, *PLN*'s former co-editor, which terminated his involvement with *PLN*. So far the case has gotten some local publicity with minor articles in the *Seattle Times* (on the weather and obituary page) and *Post-Intelligencer*. National Public Radio interviewed both Ed and Frank Cuthbertson, our lawyer, and they have also been interviewed by journalist Nat Hentoff who will be doing an article on the suit. *The Progressive* has also reported on the suit. So in that sense the suit is already a "success" in terms of raising public awareness about prisoners' rights and free speech issues.

The attorney general, Talis Abolins, has responded on behalf of the parole board, with a boiler plate reply. When I asked Frank how he could tell it was a boiler plate reply he said "because he asked the court to stay the suit until we exhaust state remedies over loss of good time in a prison disciplinary hearing." The suit challenges only the parole boards conditions of release affecting Ed's involvement with *PLN*. We will be seeking a preliminary injunction shortly. Our readers will be kept posted as the suit progresses.

Everyone at *PLN* would like to thank Ellen Spertus who generously donated three sets of Microsoft Office Professional to *PLN*. This will enable us to synchronize our computer operations and, hopefully, achieve greater ease of operation for our computer stuff. Ellen's generosity is greatly appreciated. We wouldn't have been able to afford it and we were having some major problems with our word processing software, Word-Perfect 6.0 for Windows, which does not work very well. The switch to MS Word, which does work, should make things go more smoothly now. We still need a 386 or higher computer to help with our desktop publishing end of things, anyone interested in donating one please contact me.

We continue to receive inquiries about how people will know when their subscription to *PLN* is going to expire. Institutional subscribers receive an invoice four months before their subscription expires. Four months before individual sub-

scriptions expire they get a little card from me telling them that they need to donate if they want to keep getting *PLN*. Unless you've donated more than \$10.00 in past that is the only notice you will get from us. Otherwise you'll get a letter from us the last month of your subscription to the effect that unless you donate, no more *PLN*. We are now printing the subscription expiration on all mailing labels if it is within one year of expiring. We would really appreciate it if you would donate on your own before we send you the card and/or letter. This saves us not only the money involved in printing and mailing the cards but, most importantly, the time and energy that goes into it. Commercial publications have whole sections of paid employees devoted to nothing but getting people to renew subscriptions. We don't have that luxury. Time and energy spent getting folks to renew their subscriptions takes us away from the time and energy we would otherwise use in improving *PLN*, writing articles, outreach, etc.

We also rely solely on reader donations to publish. So when you donate and/or re-subscribe please donate generously. We are also sending letters to our readers in the legal and/or correctional professions asking them to renew their subscriptions as institutional subscriptions, i.e. at \$35.00 a year. That is because the institutional subscribers essentially serve the function of subsidizing our indigent subscribers. So as our number of indigent readers grows we need to increase our institutional subscriber base, otherwise we will be forced to cut back on our number of free subscriptions because we have to pay the printer and post office. So keep this in mind when you re-subscribe.

Please examine your mailing label and make sure it is correct. Prisoners, make sure we have your prison number correct. We occasionally get issues returned to us by prison mailrooms because DOC's numbers are mis-matched or such. This means you don't get your *PLN* and we have to pay the post office to get it back. Make sure your address is correct, it is amazing how often people don't know their own address, or if they do, they don't share it with us despite ordering a subscription.

With this issue of *PLN* we hope to begin a regular practice of mentioning other prison groups and publications which offer services and publications that will complement *PLN*. Basically, we try not to duplicate the work

and effort that others do. We want to fill the legal and informational needs of those interested and involved in the criminal justice system and prison struggle. So we tend to assume that you are already informed about other publications and get those as well. Please support other elements of the prison press, all have been supportive of *PLN* over the years.

On page 12 and 13 of the July 1994 issue of *PLN*, we excluded the citation in 'RFRA has Retroactive Application'. The cite is: *Lawson v. Dugger*, 844 F.Supp 1538 (SD FL. 1994). Enjoy this issue of *PLN* and share it with others after you are done with it.

Freedom for Political Prisoners

In July, 1992, different groups from around the world meeting in Munich, Germany over the 500th anniversary of the Columbus Encounter, formed a group called "Libertad!" around the goal of organizing an International Day of Action around the issue of political prisoners. The primary organizers of Libertad! are the Movimiento de Liberacion Nacional/Puerto Rico, National Democratic Front/Philippines, FMLN/El Salvador and the MLN-Tupamaros/Uruguay.

Libertad defines political prisoners as "Those comrades imprisoned because of their struggles, mobilizations and actions as well as those people oppressed in every country by their rulers. This includes prisoners of resistance, liberation and basis (sic) processes all over the world as well as prisoners of the class struggle fighting for the abolition of class society... it is only possible to succeed with an international campaign for the freedom of all political prisoners if it also has the aim of breaking the system of oppression and imprisonment as a whole."

There are currently over 150 political prisoners held in the US, over 800 in England, 700 in Spain, several dozen in Germany, Italy and other countries that normally don't come to mind as holding political prisoners. Thousands more are held in diverse countries around the world from Peru to Senegal, Israel, South Africa, etc. Libertad seeks to struggle for their freedom as well as social change and the political conditions needed for their freedom.

Right now the campaign is in the formative stages, they are seeking input and discussion with interested prisoners,

groups and people. They encourage people to devise their own approaches to the campaign. Their initial opening statement is four pages long, too lengthy to report here in *PLN*. We will report further developments as they occur. Those interested in further information should contact: Libertad!, C/O 3 Welt Haus, WesterbachStr. 40, 60489 Frankfurt am Main, Germany.

South African Prisoners Rebel

On June 10, 1994, prisoners in seven South African prisons rebelled, taking prison officials hostage and destroying prisons. Prisoners demanding an amnesty held a warden captive for nearly 24 hours at the Modderbee prison east of Johannesburg before releasing him. One prisoner was killed and at least 30 escaped from the prison which holds 4,000 prisoners, said Correctional Services spokesperson Chris Olckers.

Another prison spokesperson, Lt. Rudie Potgeiter, said at least 80 prisoners burned down 80 percent of the Brandvlei juvenile prison in the Cape Town area. One prisoner was in critical condition and more than 30 were taken to a hospital suffering from burns. Potgeiter said that there had been violence at two Witbank prisons east of Johannesburg after prisoners refused to return to their cells. 104 prisoners escaped from one unnamed prison during this time period.

Prisoners also rebelled at Leewkop Prison near Pretoria, J.C. Steyn Prison in Port Elizabeth and at the Ncone Prison in KwaZulu. At Ncone, 36 prisoners were injured when they attempted to take two guards captive. This series of rebellions follows earlier riots and rebellions in South African prisons shortly before the recent elections where South African prisoners demanded the right to vote, along with blacks outside prisons, for the first time in South African history. Their demands were not met.

South African president Nelson Mandela met with various government officials to discuss the rebellion. On June 11, 1994, Mandela announced that the government would cut six months off the sentences of virtually all prisoners in order to halt the rebellion. The concession fell short of the demand by prisoners and their outside advocates that all prisoners who did not pose a threat to the community be released. But the group called off the protests and prisoners discontinued their protests on that day. Correctional Services Minister Siphosizwe Mzimela announced that the sentence reduction applied to all common law prisoners except for state debtors and the mentally ill.

On June 13, 1994, 600 prisoners at the St. Alban's jail outside Port Elizabeth rioted and held a guard. They did not issue any demands which were reported by the wire services.

The historic context for these events are that South Africa has the second highest per capita incarceration rate after the United States. Despite the country's recent election of Nelson Mandela as the nation's first black president, virtually all of the country's prisoners are those who were imprisoned by the apartheid regime. Some, but not all, political prisoners have been released. Social prisoners were not affected by the change in regimes and the riots and rebellions reflect their frustration at remaining in prison under sentences imposed by the previous apartheid regime. For them, nothing had changed. The prison rebellions represent the first major protests that Mandela has faced since taking office in May, 1994.

Medical Help Sought for Danish POW

An international campaign has been launched to obtain better conditions of confinement and medical care for Swiss militant Marc Rudin, who is currently serving an eight year prison sentence for alleged robbery in Denmark. Rudin is better known as Jihad Mansour, the movement name he adopted while working with the Palestinian resistance from 1979 to 1991. During that time he designed the covers of the Popular Front for the Liberation of Palestine (PFLP) magazine *Democratic Palestine*, as well as other posters and graphics for the Palestinian cause.

In 1991 he was arrested while crossing into Turkey and spent 18 months in prison there before being extradited to Denmark. Once in Denmark he was accused of being the "fifth man" in the November, 1988, robbery of a post office. The proceeds, totaling over \$2.5 million, were allegedly intended for the Palestinian resistance.

In October, 1993, Rudin was sentenced to eight years imprisonment after being convicted solely on the basis of police allegations. Since being imprisoned he has been treated far worse than other prisoners. He is denied both exercise and normal associa-

tion with other prisoners. Rudin is held in a provincial prison, making it difficult for his friends in Copenhagen to visit him. He is being held in semi-isolation in a 15 man unit for "problem" prisoners.

Campaigners are calling for an end to Rudin's prison segregation and the petty restrictions placed on him. They are demanding his return to a Copenhagen jail and permission for him to resume exercise. They are also calling for independent medical treatment of Rudin's high blood pressure and kidney problems. Further details can be obtained from: Anti-Repression Committee-Marc Rudin, International Kulturforum, BBC Box 286, Vesterbrogade 208, 1800 Fredericksberg C, Denmark.

The Global Prison

The Human Rights Watch Global report On Prisons

Edited by Aryeh Neier 303 pp. 1993. New York: Human Rights Watch. \$20.00 (pb).

Review by David Gilbert

The Brazilian Military Police's wanton murder of 111 prisoners involved in a disturbance is just one of the grim realities presented in *The Human Rights Watch Global Report on Prisons (Global Report)* in its study covering twenty countries around the world. We learn that brutal torture of suspects—men, women and children—is routine in Turkey. We are told how a Chinese prisoner may be handcuffed behind his back for several weeks—he can only eat by lying on his stomach and lapping food like a dog—for the offense of picking up a guard's discarded cigarette butt. We're apprised of Palestinian "security" prisoners from the occupied territories being illegally held in Israel—where their families and lawyers may be restricted from visiting—packed into desert tent camps with 100° summer heat. We witness the stupefying overcrowding of a detention cell in Jamaica, where inmates sleep on a wet, filthy floor amid the stench of nearby pools of feces.

This volume is based on a six-year study that has already produced eighteen different books on specific countries. Scanning across nations, several general themes also emerge:

Corruption is common, resulting in the pilfering of supplies needed by prisoners and the extortion of their families.

Women are usually afforded a lot less in the way of programs and activities and (because there are fewer women's pris-

ons) are often held at much greater distance from their families.

Many countries now have a separate category, with far more onerous conditions, for "security" (read political) prisoners. For example, Peru has arrested over 2,500 persons in one year under its 1992 "anti-terrorism" law, which strips such prisoners of virtually every basic right.

Prison systems routinely ignore or violate the laws that govern them. "By treating criminals and those accused of crimes in an inhuman and degrading manner, and by imposing penalties not authorized by law, a society betrays the very principles that its criminal laws purport to uphold."

Perhaps the most heartrending situation is Zaire, where the general breakdown of society and rampant official corruption mean that almost no food or medical supplies are reaching the inmates. In 1991, malnutrition and lack of medical care resulted in 2,229 officially recorded deaths—a staggering eight percent of the prison population, most of whom are pretrial detainees. (Before feeling smug and superior, we need to recall the U.S.'s active historical role in Zaire, then called the Congo, in the sabotaging of the independence movement and the assassination of Patrice Lumumba. The result was the rise to power in 1965 of the U.S.-backed Mobutu Sese Seko, who now has an estimated personal fortune of five billion dollars while half of Zairean children died before age five.)

Global Report doesn't take on such issues as the U.S. role in poverty and repression in the third world, nor does it measure each country's conditions relative to its wealth. But the U.S., while not typified by the worst global examples of abuse, has its share of problems and actually leads in a couple of negative categories: 1) the highest prisoner to population

ratios of any large country—445/100,000—for an average of 1.3 million in jail or prison on any given day; 2) the biggest death row, with 2,500 persons nationwide awaiting execution.

The Human Rights Watch inexcusably fails to examine the pervasive role of racism in the application of disciplinary sanctions, which can be a central determinant of one's conditions in U.S. prisons. The study is on-point, however, in focusing on the burgeoning of super-security prisons modeled after the federal facility at Marion, Illinois. Thirty-six states have already followed suit with their own "maxi-maxis." "In Florida State Prison at Starke, some inmates are held in windowless cells from which they are allowed out only three times a week, for ten minutes, to shower. The rest of the time they are alone in the cell. This situation may last for a few years." There are numerous reports of beating in such facilities, usually in retaliation for arguing with guards.

The book makes 117 specific recommendations under seventeen general topic headings. Almost all are intelligent and humane, but many are so tame and toothless as to be nugatory. For example, they don't propose anything close to the level of independent, outside scrutiny need to put a dent in prison brutality, and they don't even address the deadly AIDS and TB epidemics ravaging many prison systems.

Global Report does not provide any adequate solutions. It is, nevertheless, an invaluable and eye-opening study grounded in the right basic premise: prisoners "...are fellow human beings and are entitled to be treated as such." When society does any less, it sullies its own humanity. This book can be ordered (#1010) from Human Rights Watch, 485 Fifth Ave., N.Y., NY 10017-6104.

them are now being held in Peruvian prisons, for the "grave crime" of representing presumed members of the insurgency.

With a blindfold covering their eyes, the defense lawyers are taken to the island where Manuel Ruben Abimael Guzman Reinoso is held prisoner. They are conducted in the midst of warnings like the above quoted to the place where the "judicial activities" are to take place. This form of torture takes around 45 minutes on each occasion.

To reach the island they must travel in a precariously unstable plastic boat for another 45 minutes, surrounded by armed marines and—sometimes—provided with lifevests, "in case of a fall into the sea", as they are told.

The island is called San Lorenzo, and on that island there is a naval base linked to the prison "El Fronton." The government rationalises the security measures taken with the lawyers by saying that the place is related to the military headquarters.

Once the hearings begin, the lawyers are prohibited from communicating with their clients. A hooded attorney—who sits in front of an investigative official—sits next to the lawyers, and the lawyers are prohibited from taking part. They are silent statues. This was the way the lawyer Alfredo Crespo Bragayrac was allowed to be with Abimael Guzman Reinoso. He had no opportunity to talk with him about his defense.

Procedures before the Peruvian military justices are done at high risk. They are carried out in military buildings and when a lawyer enters, no one knows if he will be allowed to leave the building or whether he will himself be accused and sentenced as a "terrorist." That is what happened to Dr. Crespo, who is now serving a life sentence imprisonment in a prison in Puno, which is 800 kilometers from Lima.

Someone who wants to legally assist a person accused of being a "terrorist" is in turn accused of being a terrorist, as if the defender of a burglar or killer assumes the same crime of which his client is accused.

In the Rospigliosi Castillo (a building housing the military court) there is a "common room" where all papers sent to the military justice are received. The lawyer is called to a large door, which has a small hole through which the guard asks: "What is your request?" Once the lawyer answers, he has to give the guard his identification papers and the guard takes them to the superiors. "Only one person is allowed in", he is warned. On the wall of the building, next to the door,

Peru's Lawyers: a High Risk Profession

by Jose Enrique Gonzalez Ruiz

"In the eyes and ears of the sinister power, all of us are under suspicion." *Oiga Magazine* Feb 21, 1994, p.5

To defend political prisoners in Peru is a delicate matter. The war that has been going on in the Andean country since 1980 has atrophied the legal institutions because the government has applied the U.S. counter-insurgency policies.

State power is dictatorial and human rights exist only in dreams. Being lawyers before the military justice system, defending those accused of "terrorism" or "treason to the motherland" (which for the army is synonymous with the insurgency), is a dangerous profession.

Those who were present at the trials of the leader of the Communist Party of Peru (also known as Sendero Luminoso), Abimael Guzman Reinoso, and other political prisoners, suffer psychological torture that is not merely limited to threats. Many of

there is a notice that says: "The guard has orders to shoot. Don't take the risk."

Once he is inside, he is conducted to an office attended by an official. The official informs him that his procedure should not be made before the military authority, but instead to another. No judge shows his face. They have no signatures or names. They only have numbers and keys for "identification".

The Constitution which was approved after the self-coup by the State Government of Alberto Fujimori states in Article 2, Number 10, that:

"Peruvians have the right:...

To secret and inviolable private communications and documents:

The communications, telecommunications, or the means thereof, can only be opened, taken, intercepted, or tampered with under express and justified order of the judge, in accordance with guarantees of law. Secrecy should be maintained regarding matters which are different from the matters which are under investigation.

The private documents taken in violation of this standard do not have legal effect."

However, the lawyer Crespo Bragayrac was found "guilty of terrorism" on grounds of accusations from a "repentent" person (that is someone who took part in one group considered subversive and then made a denunciation about real or supposed "terrorists") who produced compromising documents.

The "anti-terrorist" laws were issued recently. For this reason they are not known sufficiently—not even by those who are in charge of applying them. The terms regarding the presentation of appeals are dramatically restricted (for example from 24 hours to 8 hours; these hours don't take into account the times when the offices are normally closed.

The lawyers have to sleep in their offices, because if they receive a notification around midnight they must present their reply before 8 in the morning. Many times they have found, to their unhappy surprise, that they couldn't reply in accordance to the terms because the notification was made early in the morning.

At each public appearance, the lawyers are compelled to make clear that their intervention has only a professional character. Even so, they face great hostility.

In Peru it is required to be a member of the Bar Association in order to practice the profession. This is an advantage from a certain perspective for the lawyers of "terrorists", because this gives some protection. But this protection is not enough to guarantee their integrity. There are more than 40 lawyers in prison, and others have not even been as fortunate. They were simply assassinated or disappeared.

The doctrine of national security is present in the Peruvian Constitution (Articles 2, 5, and 71). One of the consequences is the high risk to the practice as a lawyer.

[Jose Enrique Gonzales is a lawyer and researcher at the National University of Autonomous Mexico (UNAM). He went to Peru on a mission to interview Abimael Guzman on behalf of the office of the US lawyer Leonard Weinglass, for the purpose of preparing representation before the Inter-American Commission of Human Rights of the OAS.]

*[Editor's Note: This article presents a little known facet of the hazards of practicing law outside the U.S. when your clients are unpopular. Lawyers in the U.S. have a public image problem, yet people forget that, like all professions, it depends on what you do. Some lawyers are content to be shills for the ruling class and either defend the status quo or actively contribute to the oppression of poor people. Others have taken a different course and chose to become, as Peter Erlinder puts it, a "people's lawyer." Lenin, Castro and Gandhi all started out as lawyers. As the article illustrates, there are lawyers today whose practice of law defending unpopular clients puts their lives and liberty at risk. Readers desiring more information about the political struggle in Peru should read either **La Nueva Bandera**, 30-08 Broadway #159, Queens NY 11106 or **Emergency Bulletin**, IEC, 27 Old Gloucester St., London, WC1N 3XX, England. Please send a donation to help cover postage and printing costs.]*

Indonesia's Final Solution to Crime

The American media was recently awash over the case of Michael Fay, an American youth sentenced to four months in jail and 6 lashes of a cane for vandalism by a court in Singapore. Singapore's laws and justice system received a fair amount of scrutiny resulting from the Fay case. However, compared to Indonesia, Singapore is pretty "soft on crime".

In 1965 the Indonesian military staged a coup against then President Sukarno. The CIA assisted both the coup and the bloody aftermath that left between 500,000 and 800,000 real or suspected members of the Indonesian Communist Party murdered, thousands more imprisoned and exiled. Since then the military dictatorship of General Suharto has ruled with an iron fist. His government is well supported by the United States and other West European countries. Labor costs are low which has resulted in mass impoverishment for the great majority of Indonesians. Any attempt at political or

labor organizing is met with brutal repression. Not surprisingly, the poverty has resulted in a wave of petty crime by street criminals.

The Indonesian government's response has been for uniformed policemen to conduct public, summary executions of alleged criminal suspects. The killings take place in crowded urban areas with the bodies left on the streets to intimidate the public. This is considered "shock therapy against criminals." Police Major General Hindarto admits his men commit such murders. He says: "We want society to be peaceful and calm. There is nothing mysterious about it. Everything is clear. The police officer in charge takes responsibility. There is no petrus." [Note: *Petrus* is an acronym of *penembak misterius* which means "mysterious killer" in Indonesian. It was the term used to refer to death squads composed of Indonesian military and police personnel who murdered political opponents and criminals while the government denied responsibility.]

According to police statistics, in the first 2 months of 1994, 24 people were shot of whom 14 were killed on the spot with the rest treated in hospitals. Things have intensified, in the first week of March, 1994, ten were killed. According to police reports all the victims are people with a criminal record, they are under arrest during nighttime hours and the victim is shot trying to flee or resist arrest.

The US state department reports 60 to 70 people were shot in the capital city of Jakarta alone in 1993. This policy has full government support. The military commander in chief, General Feisal Tanjung states: "Bandits have to be exterminated. No way will we foster them." Human rights groups and the Indonesian Bar Association have protested the policy and practice. For more information on human rights in Indonesia write: **Tapol**, 111 Northwood Rd. Thornton Heath, Surrey, CR7 8HW, England.

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The Unconstitutionality of Discriminatory Jury Selection

by Emmet Jones

The foundation for an analysis of the right to be a juror, or be tried by a jury of peers is securely rooted in the Sixth and Fourteenth Amendments of the U.S. Constitution. The Sixth Amendment prohibits any substantial under-representation of minorities. The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination in jury selection.

American law has long held that the exclusion of persons from juries because of race is unconstitutional both to the person excluded and the person standing trial (see *Ex Parte Commonwealth of Virginia*, 100 US 339, 25 L.Ed 676 (1880)

and *Strauder v. West Virginia*, 100 US 303 (1880)). In *Ex Parte Virginia*, supra, the U.S. Supreme Court upheld the imprisonment of a circuit court judge who was found to be excluding persons of African descent from jury duty.

In *Carter v. Jury Commission*, 90 S.Ct 518 (1970) and *Turner v. Fouche*, 90 S.Ct 532, black citizens brought civil rights lawsuits because they had been excluded from jury duty through unconstitutional jury selection procedures. A citizen has a constitutional right to participate in the administration of justice through sitting on juries. Any person who is denied this right because of race may bring a civil rights action for monetary and declaratory relief.

A convicted person must overcome several obstacles in order to prove a claim of jury discrimination in either a lawsuit or on direct appeal of a conviction. Federal courts will almost always dismiss a prisoner's 42 USC §1983 lawsuit against state judges and jury commissioners who are claimed to operate a discriminatory jury selection process. The federal court will usually rule that the lawsuit is actually an attack on your state conviction, and will require you to exhaust the state appellate process.

If you are appealing your conviction on the basis of jury discrimination, you must also overcome some hurdles. The first hurdle thrown in your path is: was the issue properly raised and preserved at the trial level? The second hurdle is having the resources and tenacity to stick with it long enough to obtain the necessary jury records and other evidence of minorities being excluded from the county's jury pool.

The law does not require that you get "so many blacks" or "so many whites"

on your jury. The Constitution and the law only require that the selection process is not one that intentionally excludes or discriminates.

Most cases alleging discrimination in jury selection are not lost due to lack of supporting law. The law in this field is firm. Most claims are lost from inability to get the records necessary to support the claim. Even though the jury commission records are public information, very few lawyers are going to buck the system and open this can of worms for you. Your best bet is a private investigator, or work on it as a project with a friend or family member on the outside who can access the records.

Start your studies with *Castaneda v. Partida*, 430 US 460, 97 S.Ct 1272 (1977). This leading case will not only show you what the legal requirements are for bringing and proving your claim, but also what records you'll need to prove your claim.

In order to show an equal protection violation, you must show: (A) that the procedures employed resulted in *substantial under-representation* of his/her race, or other group to which they belong; (B) Establish that the group is one that is a recognizable, distinct class singled out for different treatment under the law..., as written, or as applied; (C) The degree of under-representation *must be proved*. A disparity is proved by producing jury records and other evidence that show the actual number of minorities (or other recognizable, distinct class) appearing on juries—over a number of years—is disproportionate to the number within the community as a whole.

U.S. census and county census reports will help provide you with the number of

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Jury Selection (continued)

minorities living in your county over the years. The jury records will show how many minorities actually served on juries over the years. The comparison will help to establish if the percentage of minorities who actually served on juries is disproportionate to the percentage of minorities living in the county.

Your search should also take a look into the county's jury computer system. Some jury computers don't entirely erase minorities from the list. Instead, the computer is programmed to automatically send most minority jurors to district court or municipal courts where they sit in traffic court cases, but rarely make it to criminal trials in circuit court. Check also to see if potential jurors are mailed questionnaires and if minorities are excluded from those mailings. Get a map of the county's political districts. Color-code the areas where minorities predominately live. Compare the addresses of persons who have served on juries over the years to see how many were from minority districts. Contact the National Center For State Courts in Williamsburg, Virginia. The Center keeps track of jury data throughout America.

The state is not going to allow you to prove your case on speculation. You are going to have to come to court with proof in hand. It takes a lot of painstaking work. The same evidence that will prove your claim may also help to free hundreds of other prisoners. The state will make every effort to prevent the exposure of a racist jury selection scandal. [Editor's Note: See the accompanying article about measures taken against the author by the state of Michigan.] The state does not want to deal with the flood of lawsuits, appeals, and retrials that would follow a successful challenge to their jury selection system.

One other thing bears mention. You don't have to be black, or a minority to bring a claim of exclusion of minorities from jury duty in your state or county. The courts have consistently ruled that a white person is harmed as much as any other if minorities are intentionally excluded from jury lists, panels, or his jury trial. See: *Powers v. Ohio*, 111 S.Ct 1364 and *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct 2163, for two of the leading cases where white prisoners have won reversals because of the exclusion of black jurors.

I purposely did not discuss *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct 1712 (1986), although it bears reading, because *Batson's* focus is mainly on the prosecutor using preemptory challenges to remove the few blacks that are left at the trial stage. My intent was not to focus on those few token blacks, but to inquire into the absence of thousands of blacks and minorities who were never put on the jury list in the first place.

[Editor's Note: For further analysis of this issue, see: *Mitchell v. Morgan*, 844 F. Supp 398 (MD TN 1994) which was reported in the July 1994 issue of *PLN* (Vol. 5, No. 7) in an article entitled *Prisoners Have Right to Jury From Community*.]

Michigan Prisoner Challenges Jury Selection Process

by Dan Pens

PLN rarely reports on criminal law cases, but when we think one will interest our readers we print it. Such is the case with an interesting legal struggle going on in Michigan. *PLN* reader Emmett Jones (see his article on page 1, *The Unconstitutionality of Discriminatory Jury Selection*) initiated a challenge to the Michigan state jury selection system that has rocked the courts. Jones was convicted in 1988 of unarmed robbery by an all-white jury in Kalamazoo county. In 1992 he appealed his conviction and won a reversal because the trial judge failed to give proper instructions to Jones when he chose to represent himself. The state appealed and the case was sent to the state supreme court. Meanwhile, Jones started studying the law in earnest. He got a job in the prison law library so he could study

more diligently. The time was well spent. In March of 1993 he filed suit in federal court under 42 USC §1983, §1985 and §1986. He named the circuit court judges in Kalamazoo county (among others) as defendants, claiming that they knowingly and intentionally rigged the jury selection process to exclude minorities from sitting on juries in criminal trials. The defendant judges, as a matter of course, claimed judicial immunity (everybody knows you can't sue a judge for his/her actions from the bench). The only problem is, the duties the judges perform while supervising the jury selection process are *not* protected because they fall outside of the scope of "actions from the bench." When the motion to dismiss failed on this point, the Michigan state judicial system realized Mr. Jones' suit represented a substantial threat. Coincidentally, Jones' world started to cave in.

Guards started shaking down his cell - up to six times in one day. Drugs were "discovered" in his cell, and he was removed from his job as law library clerk. He had never been beefed for drugs while incarcerated, had never failed a urinalysis test. The guard who wrote the infraction report turned out to have not been on duty the day he allegedly found the drugs. Jones filed suit. The guard named in the suit submitted an affidavit stating that he wrote the report based on what he was told to do by the Deputy Warden of the prison.

Jones had been communicating with the local media, and the story of his challenge to the jury selection system was starting to make a splash in the Michigan mainstream press. [*PLN has copies of about a dozen such articles*] The state of Michigan was beginning to feel the pressure. They buried Jones in the deepest, darkest hole they could find. In July of 1993, he was rousted out of his cell at 2:00 am and transported 700 miles to Baraga

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Max Facility, the most remote super-max facility in the state. He was kept in total isolation, allowed no phone calls. His mail was "lost". He was refused writing paper. Cells adjacent to his were even kept vacant! While in isolation, he was allowed out of his cell only for showers, but had to wear cuffs, belly chain, and a dog leash. On occasion, he was rushed and gassed Ninja-Turtle-goon-squad style. The Michigan state supreme court stayed the order of reversal of his conviction, claiming they needed extra time to examine the record to see if an "exception" should be made to the law requiring the trial judge to advise a defendant against representing himself at trial. The Michigan DOC was holding him in limbo, and the stay effectively put his appeal in limbo, too.

Emmett Jones showed in his suit that, "For the past 20 Years Michigan judges and jury commissioners have rigged (programmed) their jury computers to, en masse, exclude from jury duty black and minority citizens. Counties are divided into political districts. The computers are rigged to exclude from jury duty any persons living in certain of those districts. Each district excluded just so happens to be districts heavily populated with black or other minority citizens."

"Those blacks and minorities you occasionally see on juries are those blacks who live in the suburbs, or white neighborhoods, are usually conservative, and have a poor estimate of inner city blacks."

By combing through the county jury records, compiling demographic data, and meticulously plotting that data on maps that show county districts, Jones was able to substantiate his claim that the jury system is rigged. The county responded by appointing a commission to look into the allegations. After nine months of investigation, Ralph Chandler, head of the commission, said, "According to the 1990 Census about 40 percent of the black residents living in the county of Kalamazoo live in the city of Kalamazoo, and that this large segment of black persons have been excluded from jury panels in the circuit courts by unlawful patterns, policies and customs of court officials."

Chief Circuit Judge Philip Schaefer responded by ordering an examination of the current jury pool. Out of 25,000 names of Kalamazoo county residents in the jury pool, not a single Kalamazoo city resident had been allocated to a circuit

court jury! Schaefer said, "Effective immediately, I have ordered the reallocation of those 25,000 so that we get a representative sampling in circuit court." But that doesn't change the fact that the system was rigged for over *twenty* years. Attorney James Ford said, "I think there's a major problem here. I think they may have to retry every criminal defendant they have tried in the last several years."

It is for that reason, the possibility that Jones' suit may result in hundreds (maybe thousands) of retrials that he was stuffed away in Baraga "Super Max". It's no coincidence that a large proportion of *PLN* readers are isolated in these so called "control units." A lot of our readers are also successful litigators. The kind of harassment that Emmet Jones suffered in this case is not unique. It's an occupational hazard for prisoner litigators. The ones who file silly, frivolous suits are less likely to be slammed into a super-max. The ones, like Emmett Jones, who file well crafted suits and who actually open a crack in the facade of state repression are the ones who suffer the most.

One more note about this case. I think Mr. Jones may be blind to the fact that the jury system was rigged to exclude people *of class*, not people of color. The county districts which were purposely excluded are districts where poor people live. I believe the ones who rigged the jury selection system are more concerned about excluding *oppressed* people in general (regardless of race) from sitting on juries. The courts are mainly a tool of the ruling class, designed to protect the lives and property of the "haves" from the "have nots". This method of enforcing systemic economic disparity works most effectively when you exclude the "have nots" from sitting on juries. As Jones himself noted, "Those blacks and minorities you occasionally see on juries are those blacks who live in the suburbs, or white neighborhoods, are usually conservative, and have a poor estimate of inner city blacks."

It is notable, though, that the law is *also* blind to class differences. It serves the ruling class to deny the existence of class conflict. As a way of diverting citizens' attention away from the fact that these class struggles exist, the ruling class perpetuates racism. Our collective consciousness is guided by the media, the law, and the government to see the struggle in terms of race differences. Racism, then, is a shield that protects the ruling

class. That is why there is a rich body of law defining the issue of *racial* discrimination. It is because Jones used this body of law to substantiate his claims that he was able to succeed.

UPDATE: As of July 4, 1994, Emmett reported the following to *PLN*: "The pressure [on the courts] is finally having its effect. The courts have been ordering retrials, but only on a case by case basis. All the retrials have been based on the 6th amendment. The courts are still denying any 14th amendment violations as such would lead to hundreds or thousands of retrials. They deny that the system intentionally discriminates, or had a disproportionate effect."

Emmett also reports that the increased media attention caused the state supreme court to finally rule on his original appeal. He was sent back to Kalamazoo county as a pre-trial detainee, and has been released on bail pending a retrial. His July 4 letter closes with, "The article in *Prison Legal News* should help to keep the heat on. I don't think that Michigan is the only state to rig its jury computers."

Prison Racial Segregation Illegal

In 1970s a federal judge issued an injunction enjoining racial discrimination in the operation or administration of the Louisiana State Penitentiary (LSP) at Angola, LA. The court ordered prison officials to immediately correct the effects of any past racial discrimination and to maintain Angola as a completely integrated facility. Despite the court order it remained the practice of officials at Angola not to mix black and white prisoners together in the same two man cell. Three Angola prisoners filed suit in federal court claiming that this practice of cell segregation violated their right to equal protection under the law. They claimed that white prisoners in two man cells received preferential treatment over cells occupied by black prisoners; i.e. white two man cells were called to showers and to sell blood plasma first, enjoyed better phone and commissary privileges and had a better view of the television.

The district court ruled that the LSP continued to be illegally segregated by race and awarded the three prisoners \$1.00 each in nominal damages and

Prison Segregation (continued)

\$2,000.00 in punitive damages against the former warden, Frank Blackwell and the estate of C. Paul Phelps, the former Secretary of the Louisiana Department of Public Safety and Corrections. The court appointed a special team to monitor the new warden's desegregation policy. All parties appealed and the court of appeals for the fifth circuit affirmed the district courts, ruling and remanded the case for an award of attorney fees to the prisoner plaintiffs.

The appeals court began by noting that racial segregation in prisons is unlawful since the Supreme Court decided *Lee v. Washington*, 390 US 333, 88 S.Ct. 994 (1968). Prison officials argued that they were entitled to an exception to this general rule due to "security considerations." Namely, that integrating cells would lead to an increase of tension, violence and animosity between prisoners. The court rejected those arguments stating they expected prison officials to take appropriate action with violent prisoners regardless of race. "Even the racial segregation of offending individual prisoners would be acceptable if, based on an individualized analysis, the prison officials determined such action would be needed to stifle particular instances of racial violence." The court rejected the segregation of prisoners by noting that the rest of the prison had been successfully integrated without incident. Thus they held the practice of segregating two man

cells in Angola as late as 1990 to be unlawful and in violation of the fourteenth amendment's equal protection clause. They also held prison officials were not entitled to qualified immunity for their actions.

The court upheld the award of nominal compensatory damages to the plaintiffs because they had failed to show that they had suffered any real harm or quantifiable loss as a result of the prolonged deprivation of privileges. A magistrate had initially awarded the prisoners \$5,000 in punitive damages, which the district court reduced to \$2,000. The prisoners argued the amount was too low to begin with and should not have been reduced; the defendants claimed no punitive damages at all should have been awarded. The appeals court upheld the reduced damage awards because the defendants in this case were no longer in charge of Louisiana prison policy. The purpose of punitive damages is to deter future violations of constitutional rights. "The district court concluded that the elimination of racial segregation would be better served by the threat of future contempt sanctions against the present warden than by the extraction of money from people no longer affiliated with Angola." The total award of punitive damages was \$4,000.

The appeals court held that the prisoners were entitled to an award of attorney fees and remanded this issue to the district court for a determination of proper fees. See: *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994).

The Death Penalty in Black and White

By Michael Ross

"[The] evidence shows that there is a better than even chance in Georgia that race will influence the decision to impose the death penalty: a majority of defendants in white-victim crimes would not have been sentenced to die if their victims had been black."

Surprisingly those words were written by former United States Supreme Court Justice William Brennan in 1987 when he criticized the majority of the Court for continuing to uphold a "capital-sentencing system in which race more likely than not plays a role...."

Racism; it's a nasty word and many people would prefer to look the other way and deny its very existence. But not only

does it exist, it exists in one of the most sensitive areas of our judicial system - capital punishment.

The question of racial discrimination in capital sentencing procedures has prompted an ongoing debate. And racism was a major reason why United States Supreme Court Justice Harry Blackmun recently deplored our country's use of the death penalty stating: "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed." And he further stated "it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all."

There is much evidence to show that race is an important factor in determining who will be sentenced to die for a crime and who will receive a lesser punishment for the same exact crime. Extensive research on capital sentencing patterns over the past 20 years have repeatedly found that race considerations, whether conscious or subconscious, permeate decisions of life and death in state courts throughout our country.

One simple way to see this is to examine the make-up of the current death row population. According to the NAACP's Legal Defense and Education Fund's publication *Death Row, U.S.A.* as of January 1994, 1117, (40%) of the prisoners under sentence of death in America were black, despite the fact that blacks comprise only about 12% of the population nationally. In some states blacks condemned to death outnumber whites condemned to death. Finally, if you consider all minorities as a group, a full 50% (1,401 men and women) on death row today are non-white.

Consider a few statistics from the January 1994 issue of *Death Row, U.S.A.*:

Alabama - 50 (43%) of their 117 death row inmates are black; blacks make-up only 26% of the state's population.

Louisiana - 28 (68%) of their 41 death row inmates are black; blacks make-up only 25% of the state's population.

Mississippi - 31 (58%) of their 52 death row inmates are black; blacks make-up only 36% of the state's population.

North Carolina - 48 (38%) of their 128 death row inmates are black; blacks make-up only 23% of the state's population.

South Carolina - 21 (42%) of their 50 death row inmates are black; blacks make-up only 30% of the state's population.

Virginia - 23 (50%) of their 47 death row inmates are black; blacks make-up only 19% of the state's population.

Although many people would find these statistics to be shocking, they might not be too surprised. After all, the south has always been perceived as being more racist than the rest of the country. So consider a few statistics from some other, non-southern states:

Illinois - 97 (60%) of their 162 death row inmates are black; blacks make-up only 15% of the state's population.

Maryland - 11 (80%) of their 14 death row inmates are black; blacks make-up only 25% of the state's population.

New Jersey - 5 (56%) of their 9 death row inmates are black; blacks make-up only 15% of the state's population.

Ohio - 62 (47%) of their 127 death row inmates are black; blacks make-up only 10% of the state's population.

Pennsylvania - 101 (60%) of their 168 death row inmates are black; blacks make-up only 10% of the state's population. And while I don't have the figures of the minority populations for the two states with the country's largest death row populations, both have significantly high minority populations of condemned men:

California - 215 (56%) of their 380 death row inmates are non-white.

Texas - 203 (56%) of their 363 death row inmates are non-white.

However, statistics on the race of the offender alone do not necessarily prove bias, given that roughly 50% of those arrested for murder are black. Of far more significance are the racial disparities revealed by an examination of the race of the murder victim in cases where the death penalty is imposed. The 227 prisoners executed between 1976 (when the death penalty was reinstated by the courts) and January 1994, had been convicted of killing 302 victims. Of these victims 255 (84%) were white and only 47 were black or of another minority group. While 86 black or ethnic-minority prisoners have been executed for murdering white victims, only two white murderers have been executed for the murder of a non-white - one for the murder of a black man and one for the murder of an Asian woman. And while the figure is somewhat dated, as of mid-August 1988, 727 blacks were under the sentence of death for killing white victims, while only 43 whites were under sentence of death for killing black victims.

Numerous studies have been conducted to try to quantify the extent of racial disparities in capital cases. One study done in the late 70's by William Bowers and Glenn Pierce, both of Northeastern University, compared statistics on all criminal homicides and death sentences imposed in Florida, Georgia, Texas, and Ohio. Death sentences in these four states accounted for 70% of all the death sentences imposed nationally at that time. They found that far more killers of whites than killers of blacks were sentenced to death. They also found that al-

though most killers of whites were white, blacks who killed whites were proportionately more likely to receive the death sentence than any other group.

In Florida and Texas, for example, blacks who killed whites were, respectively, five and six times more likely to be sentenced to death than whites who killed whites. And among black offenders in Florida, those who killed whites were 40 times more likely to get the death penalty than those who killed blacks. No white offender in Florida had ever been sentenced to death for killing a black person up through the period studied (a white man sentenced to death in Florida in 1980 for killing a black woman was the first white person in that state to be sentenced to death for the murder of a sole black person - and he has yet to be executed).

Several other studies, conducted in a variety of capital punishment states, have arrived at the same conclusion: killers of whites are far more likely to be sentenced to death than killers of blacks.

An exhaustive study conducted in the early 80's by Professor David Baldus sought to discover why killers of white victims in Georgia had received the death penalty approximately 11 times more often than killers of black victims.

He found that the two most significant points affecting the likelihood of an eventual death sentence were the prosecutor's decisions on (1) whether or not to permit plea bargains and (2) whether or not to seek a death sentence after a murder conviction. Black-victim cases were far more likely to result in pleas to manslaughter or life sentences upon conviction of murder, than cases with white victims. Black defendants with white victims were both less likely than others to have their charges reduced and more likely than others, upon conviction of murder, to receive the death penalty.

Professor Baldus noted that prosecutors had sought the death penalty in only 40% of the cases where defendants were convicted of a capital crime - the others received automatic life sentences without a penalty hearing. But perhaps the most disturbing finding was that although cases with white victims tended to be more aggravated in general, the levels of aggravation in crimes involving black victims had to be substantially higher before prosecutors would seek the death penalty. Thus the overall disparities in death sentencing were due more to the prosecutors' charging and sentencing

recommendations than to any jury sentencing decisions.

Several other studies have also found significant racial disparities in prosecutors' decisions on charging. The Bowers study found that the victim's race had a significant "extra-legal" influence on whether or not a capital charge would be filed. And a study done by Michael Radelet and Glenn Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, found a tendency by some prosecutors to "upgrade" cases with white victims and "downgrade" those with black victims.

However, these findings and others like them do not necessarily imply that prosecutors deliberately discriminate in their charging and sentencing recommendations. In areas with a large white majority population that strongly supports the use of capital punishment, there is inevitably more pressure on prosecutors to seek the death penalty in cases with white victims than in those with black victims or victims from other minorities. Also, in general, there is more community outrage, publicity, and public pressure when the murder victim comes from a middle-class background, which unfortunately is more likely to apply to whites than blacks.

The issue was well summed up by the authors of a study similar to Professor Baldus' when they wrote: "Since death penalty prosecutions require large allocations of scarce prosecutorial resources, prosecutors must choose a small number of cases to receive this expensive treatment. In making these choices they may favor homicides that are visible and disturbing to the community, and these will tend to be white-victim homicides." (Gross and Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*).

In 1987, the United States Supreme Court examined the issue of racial discrimination in the death penalty, in the case of *McCleskey v. Kemp*, to determine if Georgia's capital punishment system violated the Equal Protection Clause of the Fourteenth Amendment. The Court demanded a seemingly impossibly (and for many observers, a clearly unfair) level of proof for the defendant who was required to prove either (1) that the decision makers in his particular case had acted with a discriminatory intent or purpose, or (2) that the Georgia State Legislature had enacted or maintained the death pen-

Death Penalty (cont.)

alty statute because of an anticipated racially discriminatory effect.

The Court, by a narrow five to four majority, concluded that statistics alone do not prove that race entered into any capital sentencing decision in any one particular case. The Court further noted that: "Any mode for determining guilt or punishment has its weakness and potential for misuse. Despite such imperfections, constitutional guarantees are met when the mode for determining guilt or punishment has been surrounded with safeguards to make it as fair as possible."

However, the majority did indicate that the arguments should be presented to the individual state legislative bodies, for it is their responsibility, not the Court's, to determine the appropriate punishment for particular crimes. They noted that "Despite McCleskey's wide ranging arguments that basically challenge the validity of capital punishment in our multi-racial society, the only question before us is whether in his case... the law of Georgia was properly applied."

In a dissenting opinion, Justice John Paul Stevens noted: "The Court's decision appears to be based on a fear that acceptance of McCleskey's claim would sound the death knell for capital punishment.... If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder 'for whites only') and no death penalty at all, the choice mandated by the Constitution would be plain."

Following the *McCleskey* ruling a Congressional bill entitled the "Racial Justice Act" was drafted. The bill would forbid "racially disproportionate capital sentencing" and would outlaw death sentences found to have been imposed in a racially discriminatory manner. It was debated and defeated in the United States Senate by a vote of 52 to 35 on October 13, 1988. In subsequent years, this same bill has been consistently defeated on every occasion that it has come up for a vote.

We cannot simply continue to live with the illusion that capital punishment works in the perfect unbiased manner that we desire. While we may wish otherwise, race has an indisputable and integral part

in our capital punishment system. The evidence is not speculative or theoretical, but rather is empirical. One of the most telling statistics from the Baldus study was that six of every eleven defendants convicted of killing a white person would not have received the death penalty if their victims had been black. These figures may vary from state to state, but the underlying conclusion remains the same: the taking of a white life is worth greater punishment than the taking of a black life. Is this the kind of system that we want?

Justice Brennan once wrote: "We have demanded a uniquely high degree of rationality in imposing the death penalty. A capital-sentencing system in which race more likely than not plays a role does not meet this standard."

It is clearly time to abolish the death penalty. There are suitable alternatives. Those who favor the abolition of the death penalty do not advocate releasing convicted murderers into society. The choice is not between the death penalty and release, but between the death penalty and life imprisonment. Replacing the death penalty with natural life sentences (with no possibility of release) is clearly a suitable alternative that fulfills society's requirements to be protected. Race will undoubtedly still be a factor in other sentencing decisions. However, until we can find a way for our society to solve its problems with racial discrimination in the judicial system, we cannot allow race to be a factor in determining who lives and who dies.

What can you do to help? Several organizations are working hard to rid our country of capital punishment. Contact one or more of the following: - National Coalition to Abolish the Death Penalty (1325 "G" Street, NW; Lower Level - B; Washington, DC, 20005. Tel. 202-347-2510). - Murder Victims Families For Reconciliation (2093 Willow Creek Road; Portage, IN 46368 Tel. 219-763-2170). - Catholics Against Capital Punishment (P.O. Box #3125; Arlington, VA 22203 Tel. 703-522-5014). - Amnesty International USA (Campaign to Abolish the Death Penalty; 322 Eighth Avenue; New York, NY 10001 Tel. 212-807-8400). - American Civil Liberties Union (Capital Punishment Project; 122 Maryland Avenue, NE; Washington, DC 20002 Tel. 202-675-2319).

Demanding Death

By Mumia Abu-Jamal

Michael Alan Durocher, of Florida's Death Row, wrote to the Governor, literally begging for death. Gov. Lawton Chiles agreed, signed his death warrant, and Durocher sent him a thank you note.

On August 25, 1993, at 7:15 a.m., Durocher, 33, got his wish.

California's death row convict, David Mason, fired his appellate lawyers, saying he was both willing and ready to breathe his last in the gas chamber. Mason, 36, angrily decried what he called the "industry" of lawyers who capitalize off of appeals in capital cases. Even after his last ditch change of heart, where he sought life, his case came to symbolize the growing incidence of death row prisoners who demand death. There is, however, a critical difference between perception and reality.

There are approximately 2,600 men and women on Death Row in the U.S.. To date, only 26 people have volunteered to be executed; less than 1%. The Washington, D.C.-based National Coalition to Abolish the Death Penalty has assembled facts on this phenomenon detailing the race of those persons choosing execution and found what is shown on TABLE 1:

TABLE 1

Race	Number	Percent
White	21	80.8%
Black	2	7.7%
Latino	2	7.7%
N/A	1	3.8%

No meaningful analysis of the incidence of volunteer execution can take place without noting who does so. How does a bare minority of Death Row, become an over whelming majority?

Whites constitutes less than 51% of all Death Row prisoners in the U.S., so why are over 80% of the volunteers white?

Nationally, blacks constitute roughly 46% of state prisoners. In 35 states, new court commitments for blacks entering prison stands at 51.3% of all admissions, according to the U.S. Bureau of Justice Statistics. Increasingly, since the rebellions of the 60's, prisons have become blacker and blacker, a threatening, fearful milieu to white prisoners, among them, those on an increasingly blacker Death Row.

For far too many African-Americans, imprisonment has become a warped rite of passage, a malevolent mark of "manhood" that denies black men entry into more socially acceptable realms of economic activity. For whites, however, even working class, it is a mark of social expulsion, and affirmation of one's out-cast status. Alienated from a social order that has prescribed death, and further alienated from a younger, blacker, more militant prisoner either on death row or in population, is there any wonder that the majority of prisoners who have opted for death have been white? To this must be added the onslaught from the federal judiciary which has eviscerated the Writ of Habeas, thereby thickening the atmosphere of despair that pervades Death Row. For all on Death Row, White, Hispanic, Asian, Native American, or women, the regime of lockdown, loneliness, and hopeless waits for death exacts a terrible psychic, spiritual, psychological toll. Fear of approaching, advancing lassitude, the loosening bonds of loved ones, the specter of prison as a foreboding old folk's home—all these things play a part, more crucial than admitted, in the headlong rush for death.

As long as conditions on the Row are soul-killing by design, there will continually be those who would rather die than live another day in these man made hells.

Reprinted from *Endeavor*.

Delay in Dental Care Creates Fact Dispute

Wardell Patterson is a Missouri state prisoner. On February 12, 1992, Patterson had a tooth filled by William Pearson, the prison dentist. The next day Patterson began suffering from swelling, headaches and severe pain. Patterson's unit manager contacted Pearson about the problem and Pearson instructed him to file a "sick call request." Patterson promptly did so. Despite this and repeated requests for treatment Pearson did not extract the infected tooth until April 15, 1992, over two months after Patterson first complained of pain. Patterson filed suit claiming that this lengthy delay in treatment violated his eighth amendment rights. The district court granted summary judgement in favor of Pearson holding that at most Patterson disagreed with the treatment he had

received, and dismissed the suit. In a brief opinion the court of appeals for the eighth circuit reversed and remanded.

The appeals court simply held that this case was indistinguishable from *Fields v. Gander*, 734 F.2d 1313 (8th Cir. 1984), where summary judgment was reversed because the prison dentist in that case refused to provide follow up dental care for three weeks, despite knowledge that the prisoner patient was suffering severe pain "could support a finding of an eighth amendment violation." A similar case cited was *Hunt v. Dental Department*, 865 F.2d 198 (9th Cir. 1989). The appeals court remanded the case for a trial to resolve the disputed issue, i.e. did the delay constitute deliberate indifference to Patterson's eighth amendment rights. See: *Patterson v. Pearson*, 19 F.3d 439 (8th Cir. 1994).

PA Prisoners Enjoy Right to Parole Consideration

By William L. Marshall

In an opinion entered February 28, 1994, the Pennsylvania Commonwealth Court held that under Section 11 of the PA Parole Act (61 P.S. § 331.22), while the PA Board of Probation and Parole ("the Board"), in its discretion has authority to either grant or deny a state prisoner parole. Section 11 does not in anyway restrict a prisoner's right to apply for parole once a minimum sentence expires. Nor does it grant the Board discretion to refuse to consider any prisoner's application for parole. See: *Marshall v. PA Board of Probation & Parole, Case No. 198 M.D. 1993 (PA Commonwealth Ct. 2-28-94) _ A.2d _ (1994).*

This ruling arose from a civil action commenced by William L. Marshall, a state prisoner at SCI-Huntingdon, challenging a decision by the Board refusing to process his parole application until he gained a favorable recommendation from the Pa. Department of Corrections. The court determined that the Board improperly refused to process Marshall's parole application and ordered relief.

The decision is important to Pennsylvania prisoners because: (1) Under state law, parole decisions are discretionary, there are no "good time" provisions; prisoners have no right to parole and only

become "eligible" for release at the expiration of the minimal sentence. *Bachman v. Jeffes*, 488 F. Supp 107 (MD PA 1980). (2) The Board has implemented a policy of refusing parole consideration to segregated, and certain prisoners requiring them to complete their total (maximum) sentences. *Gillespie v. Pa. Board of Probation & Parole*, 505 A.2d 403, appeal denied 515 PA. 588, (1986). And (3) The court had previously held that because prisoners have no inherent right to parole, any decision by the Board was not subject to judicial review. *Reider v. Pa. Board of Probation & Parole*, 514 A.2d 967 (1986).

Finally, under section 11 of the Parole Act, to be considered for release, a state prisoner must submit an *ad hoc* parole application six months before completion of the minimum term. The board is then mandated to interview the prisoner and render a decision within the six month period. If parole is refused, the Board must provide a brief statement of reasons for its action and the prisoner can immediately resubmit a new application.

While a prisoner in Pennsylvania has no right to parole, he/she does enjoy a protectable liberty interest in being seen and heard and in compelling the Board to comply with the appropriate law.

Disciplinary Guilty Plea No Waiver to Suit

Joe Reeves is a Texas state prisoner. He was infraacted for placing his food tray outside his cell in the segregation unit. A prison rule required that food trays remain inside prisoner's cells until collected by guards. Reeves had received no notice prior to this that his behavior was prohibited. At his disciplinary hearing Reeves pleaded guilty to the charge. He later filed suit under 42 U.S.C. § 1983 claiming that the lack of prior notice violated his due process rights. After an evidentiary hearing a magistrate dismissed the suit holding that by pleading guilty to the disciplinary charge Reeves waived all non-jurisdictional claims, including his claim that he could not be punished for conduct of which he had no notice. The court of appeals for the fifth circuit reversed and rendered a verdict that the disciplinary hearing was arbitrary and capricious, in violation of due process.

Disciplinary (cont.)

It is well established law in the fifth circuit that it violates due process to punish prisoners for acts they could not have known were prohibited. See: *Adams v. Gunnell*, 729 F.2d 362 (5th Cir. 1984). Prisoners are entitled to prior notice or fair warning of what conduct is prohibited in prison before they can be punished. In this case, the appeals court held that the preponderance of evidence in this case showed Reeves could not have known his conduct was prohibited. Three witnesses testified that prisoners entering the segregation unit were not given copies of the rules and there was no opportunity to read the rules posted on the segregation unit's bulletin board. The defendants offered no witnesses with personal knowledge that the segregation unit rules were actually handed out to prisoners nor were the prisoners given an opportunity to read the bulletin board. Holding that this was a purely legal question the court reviewed the case *de novo*. While Reeves admits to having pleaded guilty to the charge of violating a posted rule, the appeals court held he could not have known that putting his tray outside his cell was prohibited before he was incarcerated. "That plea in no way waives his right to present his defense of lack of notice. In light of this finding, the decision reached by the prison board is both arbitrary and capricious."

"Reeves' admission that he pleaded guilty at the disciplinary hearing cannot constitute a waiver of his due process claim... In a criminal proceeding, a defendant is represented by counsel, and the district court explains the charge against the defendant, the penalties he is subject to, and the rights he is waiving by pleading guilty.... An inmate pleading guilty in a prison disciplinary hearing is not protected by the same procedural safeguards. We therefore do not give the same preclusive and binding effect to a guilty plea in a disciplinary hearing."

"Reeves does not waive the notice defect. He was entitled to a fair warning, or fair opportunity to know, that his conduct was prohibited before being punished for that conduct, and the facts show that he did not have that opportunity. We accordingly reverse the lower court's decision." See: *Reeves v. Pettcox*, 19 F.3d 1060 (5th Cir. 1994).

BOP Ad Seg Rules Create Liberty Interest

Jerome Crowder is a paraplegic federal prisoner confined to a wheelchair. He filed suit against officials of the Metropolitan Corrections Center (MCC) in Chicago claiming he was placed in administrative segregation without a hearing and as a result of this he was denied proper medical care. The defendants filed a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12 (b)(6). The district court denied the motion in part and granted it in part. On the defendant's motion to reconsider the court held that the BOP's rules on administrative segregation (ad seg) create a due process liberty interest. However, this right was not clearly established so the defendants were entitled to qualified immunity. The district court held that 28 C.F.R. § 541.22, the BOPs ad seg rules, create a due process liberty interest. Noting that prisoners have no right under the federal constitution to remain out of segregation, the court must look towards state and federal administrative rules and law to determine if a due process liberty interest has been created by the state.

The court reviews numerous cases that, prior to this, have held that BOP ad seg regulations do not create a due process liberty interest. The court distinguished this case from those by holding that in this case Crowder was completely denied any hearing before being placed in ad seg. In the other cases the prisoners were essentially challenging the results of the hearing (i.e. being put in ad seg) rather than attacking the process by which they were placed in ad seg. The court cites *Kimberlin v. Quinlain*, 774 F. Supp 1 (DC 1991) for the prospect that 28 C.F.R. § 541.22 grants federal prisoners a liberty interest in remaining free from administrative segregation without compliance with the regulation's due process requirements. [Editor's Note: This case was later reversed on other grounds by the court of appeals for the District of Columbia Circuit. See *PL N*, Vol. 5, No. 3.] In this case Crowder alleged he suffered significant harm as a result of the denial of the ad seg hearing because his medical condition was not considered or reviewed by a hearing officer. The court found that these allegations were sufficient to state a

claim for violation of a liberty interest cognizable under the due process clause.

Because of the conflict among the circuits as to whether 28 C.F.R. § 541.22 creates a due process liberty interest, any constitutional rights, as opposed to administrative rights, were not clearly established. Thus, the defendants were entitled to qualified immunity from money damages on Crowder's due process claims relating to his ad seg placement. Based on this the court dismissed the suit. It is unclear whether Crowder had sought injunctive or declaratory relief as well, i.e. release from ad seg or a hearing. If he had, those claims may have been mooted by a transfer to a permanent prison and/or release from ad seg. See: *Crowder v. True*, 845 F. Supp 1250 (ND IL 1994).

Breach of Contract Claim OK Against Medical Contractor

On December 22, 1992, Eddie Cherry began serving a 30 day sentence in the Polk county jail, Florida, for drunk driving. At the time of his incarceration he told jail staff that he drank approximately a case of beer a day. Over the next two days he repeatedly sought medical attention for symptoms associated with alcohol withdrawal. On December 25, Cherry's wife contacted jail staff and told them that her husband had a history of delirium tremens (DTs) during alcohol withdrawal and that he was in immediate need of a physician's attention. Cherry's cellmate and other prisoners repeatedly told jail staff that Cherry required medical attention because he was hallucinating and shaking violently. Cherry was taken to the jail infirmary where he was shackled to his bed. On December 26, still hallucinating and suffering from DT's, Cherry jumped or fell off the end of his bed. Due to the shackles Cherry struck his head on the concrete floor and died five days later as a result of his injuries.

Loretta Cherry, Cherry's wife, filed suit against jail officials and Prison Health Services (PHS), a Delaware corporation which was contracted to provide medical care and services to jail prisoners, claiming that they had violated Cherry's civil rights under § 1983 as well as supplemental state claims for breach of contract and negligence. The defendants

filed a motion to dismiss and to strike which the district court denied.

The court held there was sufficient evidence to indicate that Cherry, and the other Polk County Jail prisoners, were the intended beneficiaries of the medical services contract entered into between PHS and jail officials. Thus, prisoners have standing to sue, as intended third party beneficiaries, for breach of contract when PHS does not provide adequate medical care or services.

PHS sought to strike from the complaint allegations regarding the deaths of two other prisoners at the jail after PHS did not provide them with adequate care or treatment. The court refused to strike the allegations noting that they were probative of a policy or practice of neglect towards prisoners' medical needs which would be necessary to hold the county liable for Cherry's death.

As more jails and prisons across the country contract out their obligation to provide medical care to the incarcerated, suits such as this will become increasingly common. Companies such as PHS offer "savings" on the basis of denying basic care, inadequate staffing and other "cost cutting measures." Readers contemplating litigation on the denial of medical care by private companies contracted to provide it, should study this and similar cases for breach of contract claims in addition to constitutional claims. See: *Cherry v. Crow*, 845 F. Supp 1520 (MD FL 1994).

New Trial For Beating

Clifton Thomas is an Illinois state prisoner. While confined at the Pontiac Correctional Center, Thomas was accused of stabbing another prisoner. The state sought and received a court order to obtain a blood sample from Thomas to aid in the investigation of the stabbing. Prison guards summoned Thomas to the prison hospital and requested the blood sample from Thomas who refused to provide it. The guards then attempted to hold Thomas down in order to take the blood sample. Eventually ten guards and a lab technician were involved in the effort to restrain Thomas and take the blood sample. It was during this process that a guard, Robert Heath, punched Thomas in the face, yelled at him to shut up and in the process knocked four of his teeth loose. Thomas filed suit under § 1983 claiming that being hit while already restrained violated his

eighth amendment right to be free from cruel and unusual punishment.

At trial a jury found that Heath was liable for hitting Thomas but awarded no damages. Thomas moved for a new trial on the issue of damages or that the verdict be amended. Heath renewed a motion for a directed verdict or, in the alternative, a new trial. The district court denied Thomas' motion and granted Heath a directed verdict and conditionally granted a new trial. The court of appeals for the seventh circuit affirmed in part, reversed in part and remanded.

The review of a directed verdict is conducted by the appeals court *de novo* in the light most favorable to the losing party. A court examining a prisoner's eighth amendment claim must review the objective and subjective components of the claim set forth in *Hudson v. McMillian*, 112 S.Ct. 995(1992). Applying those standards to the facts of this case the appeals court held that Thomas had stated a *prima facie* case by testifying that he was struck in the face while immobilized and unable to move. After the attack Thomas testified that he was "hurting all over" and his existing dental problems were aggravated, requiring the removal of his four lower front teeth. This was sufficient evidence for the jury to find that Thomas had suffered constitutional injury. It was error for the district court to hold otherwise and grant a directed verdict in favor of Heath. The injury suffered by Thomas was sufficient to state a legal claim and a jury could find the force used was applied "maliciously and sadistically."

The appeals court held that the jury's finding of liability was irreconcilable with its award of no damages. The jury instructions required a finding of damages before a finding of liability. The contradiction between the jury's verdict and the instructions they were given required a new trial on both the issue of

VA "Men Only" Boot Camp Illegal

In 1990 the Virginia legislature created a Boot Camp Incarceration Program (BCIP) which became effective on January 1, 1991. Those entering the BCIP usually spend 90 days in it followed by a year's probation. Those unable to enter

the program, including all women, spend longer sentences either in prison or on parole. While the legislature set forth eligibility criteria when it created the BCIP, none of those criteria require that participants be male. Since the program opened no females have been allowed to attend.

Jennifer West was convicted in Virginia state court of possessing cocaine with intent to distribute. Citing the lack of a female boot camp program in Virginia she requested permission to participate in the Community Diversion Incentive Program. Her request was denied and she was sentenced to 9 years imprisonment, with three years suspended and six years on probation. She was released from prison after serving 14 months. She filed suit under § 1983 claiming that in implementing the BCIP statute the Virginia DOC acted unconstitutionally by not allowing women to participate, thus foreclosing the availability of the statute's favorable sentencing provisions for female offenders. The district court agreed with West that excluding women from the BCIP violated the 14th amendment's equal protection clause.

The district court notes that prison programs alleging gender discrimination are analyzed under a standard of "intermediate scrutiny." To withstand this standard of constitutional review a statutory classification must be substantially related to an important government regulation. This standard will "reject regulations based on stereotypical and generalized conceptions about the differences between males and females."

The court rejected the Virginia DOC's argument that excluding women from the BCIP was permissible because women prisoners's conditions of captivity "differ significantly from the prison conditions of their male counterparts." The DOC claimed the BCIP was established to address prison overcrowding and recidivism, which are most pressing in men's prisons. The court rejected that argument holding that excluding women from the BCIP was not related to those goals because "there is no evidence that the results of an all male boot camp program would be anywhere comparable to the results of a boot camp program comprised of all women or one comprised of both sexes."

The court also rejected the DOC's argument that financial considerations justified the gender discrimination. While courts accord prison officials great discretion in how they administer rehabilitation programs, such programs must be

VA Boot Camp (cont)

operated in a constitutional manner. "...when an extremely favorable sentencing alternative is provided to one class of inmates and not another, and when that classification is based solely on the inmates' gender, the line [of constitutionality] is crossed." See: *West v. Virginia Dept. of Corrections*, 847 F. Supp 402 (WD VA 1994).

Further Developments in WA Powell Case

by John Midgley

This is a further update on developments in the *Powell* litigation. The Attorney General's office recently filed in the Ninth Circuit a document in which they claimed that the Indeterminate Sentence Review Board will treat superintendents' recommendations for parole under RCW 9.95.052 just as they would have treated a superintendent's certificate of meritorious conduct under former RCW 9.95.115 — that is, as making the person who gets such a recommendation immediately eligible for parole consideration by the Board.

In response, we have filed a motion stating that the Board's interpretation is news to us; that we doubt they have applied this interpretation of law to anyone; and that even if this were the interpretation they are using, it would not matter because the AG has told superintendents not to issue certificates under former .115 and there is strong evidence that DOC officials do not make parole recommendations under .052 until at or near the end of the minimum term set by the Board. The motion therefore asks that the case be sent back to Federal District Court Judge Thomas S. Zilly for two purposes: 1) to end the blocking of the availability of the kinds of recommendations the AG claims will make people eligible for parole consideration, and 2) for consideration of the issues on a class basis. This would allow all affected prisoners to show the court whether they have been given consideration for superintendents' recommendations (or certificates under the old law), and whether — if they received favorable action from the superintendent — they have been considered for parole.

I strongly suggest that everyone affected by SHB 1457 who has completed

his or her 20 year mandatory term minus "good time" immediately ask in writing (for the second time if you have done it before) for a superintendent's recommendation for parole. If the State is really interpreting the law in the way they say, then anyone who gets such a recommendation should be immediately eligible for parole consideration. If the State is not doing what they say, then your request will help us to prove that.

Please make your request under both the old and new laws. That is, use language like the following: "I request that you both issue a certificate of meritorious conduct for me under former RCW 9.95.115, and that you recommend under RCW 9.95.052 or any other applicable law, regulation, rule or practice that the Indeterminate Sentence Review Board parole me. I ask that if you decline to consider a certificate of meritorious conduct under former 115 but do consider a parole recommendation under .052, that you apply the same standards or criteria in deciding whether to recommend parole under .052 that would have been applied in considering a certificate of meritorious conduct under former."

In your letter, you should also tell the superintendent how your incarceration has gone in terms of efforts at rehabilitation, noting, for example, your programming efforts, work, lack of infractions, etc. You should also include any recommendations from outside people or staff — particularly unit staff and your counselor that you can gather.

If you can, please send me a copy of any request you make and a copy of any response you receive. You can send materials directly or through your attorney if you have one.

We expect more papers to be filed in the Ninth Circuit, and we will keep you informed of any action by the courts. In addition, if the Ninth Circuit does not rule soon and superintendents will not act on your new requests for consideration, we will take further action to try again to get the case moving.

[Editor's Note: Over the past several years PLN has reported on Powell v. Ducharme, the case which challenges actions by the Washington state legislature which lengthened the terms of Indeterminate Sentence first degree murderers who have had the minimum terms extended by the parole board (ISRB) long past what the original minimum terms were. This case affects several hundred old guide-

line lifers in Washington state. Mr. Midgley can be contacted at: Evergreen Legal Services, 101 Yesler Way, Suite 300, Seattle, WA. 98104.]

WA Mail Policy Illegal

Timothy O'Keefe is a prisoner at the Washington State Penitentiary (WSP) at Walla Walla. In October, 1993, O'Keefe tried to mail six pieces of outgoing mail as legal mail. The letters were addressed to the prison warden; US Postal Inspector; State Higher Education Coordinating Board; Employment Security Dept. and a DOC official. WSP mailroom officials refused to mail the letters as legal mail and returned them to O'Keefe who refused to accept them. Prison officials sent three of the letters as regular mail, O'Keefe sent the remaining letters to the court as exhibits. Prison officials contended that the mail did not meet the definition of "Legal Mail" set forth in Department of Prisons (DOP) mail policy 590.500. O'Keefe filed suit seeking declaratory and injunctive relief that the actions of WSP staff and DOP policy 590.500 violated the US constitution.

District Court Judge Alan McDonald granted summary judgement in O'Keefe's favor. As the court notes, it is an issue of first impression for the ninth circuit of whether mail between prisoners and non-attorneys, i.e. government officials and agencies, is protected from being opened and read by prison officials. The court held they are. Agreeing with *Faulkner v. McLocklin*, 727 F. Supp 486 (ND IN 1989) the court found: "...that O'Keefe's mail, when sent to government agencies or officials as a grievance, is protected by his first amendment right to petition the government for redress of grievances... To permit prison officials to read prisoners' 'grievance mail' would cause the same chilling of meritorious petitions as with officials' reading mail to attorneys or courts."

The court held that a reasonable alternative for prison officials is to open and inspect such "grievance mail" in the prisoner's presence, just as "legal mail" to attorneys and courts is treated. The court concluded "DOP policy of reading grievance mail unconstitutionally impinges on prisoners' federal right to petition the government for redress of grievances." The court held that Washington Administrative Code (WAC) 137-48-020(8),

governing prisoner mail which includes mail to government agencies and officials in its definition of legal mail, does not create an independent liberty interest enforceable via §1983 because it merely defines the right.

The court held: "DOP Policy 450.100, to the extent it permits prison officials to read prisoners' grievances to government agencies or officials (or the agencies and officials' replies), violates prisoners' First Amendment right to petition the government for redress of grievances." "DOP Policy 590.500, to the extent it permits prison officials to read prisoners' grievances to government agencies or officials (or the agencies and officials' replies), violates prisoners' First Amendment right to petition the government for redress of grievances."

"Defendants are permanently enjoined from reading prisoners' grievances to government agencies or officials (or the agencies and officials' replies)." "Defendants are permanently enjoined from opening prisoners' grievances to government agencies or officials (or the agencies and officials' replies), except in the presence of those prisoners." The court order is dated June 2, 1994. While issued by Judge McDonald in Spokane the ruling has statewide effect. As we write this we do not know if Judge McDonald will publish his ruling, given its precedent setting effect it is likely he will. We ask readers to keep us posted of unpublished decisions resulting in wins for prisoners. AAG Douglas Carr represented prison officials in this case. See: *O'Keefe v. Murphy*, Case No. CV-93-3122-AAM.

WA DOC Enjoined From Taking Costs

Past issues of *PLN* have reported on the tactic seized upon by the Washington Attorney General's office to retaliate against prisoners who exercise their right of access to the courts, namely billing prisoners for the costs incurred by the AG in litigating [See *PLN*, Vol. 4, No. 6]. A party against whom a bill of costs is lodged by the federal court clerk can object to the district judge within five days of the orders entry.

Don Hemphill is a prisoner at the Washington State Penitentiary (WSP) and a *PLN* reader. After the ninth circuit

dismissed his suit, which he had won in the district court, challenging the DOC's digital probe policy, the AG's office filed a bill of costs against him. The clerk entered an order of costs on September 16, 1993, but Hemphill waited until November 2, 1993, to file his objections to the costs. Because of the delay he was barred from objecting to the bill of costs.

However, District Court Judge Justin Quakenbush entered a Temporary Restraining Order (TRO) barring the DOC from collecting costs from Hemphill. In the TRO issued December 14, 1993, Judge Quakenbush noted that had Hemphill filed a timely objection to the bill of costs it would have received serious consideration from the court. "Under properly filed objections or motions in cases similar to the present, this court would seriously consider denial of an award of costs against an indigent prisoner, so long as the claims were not frivolous, malicious, or vexatious." "It appears the State of Washington is filing cost bills against all indigent prisoners, regardless of the relative merits of the claims. A district court may deny the taxation of costs against indigent persons in the exercise of its discretion.... This seems only fair since a small sum of costs for the average person could represent an enormous percentage of an indigent person's wealth."

Because indigent prisoners might be chilled from exercising their right of access to the courts by filing meritorious claims, it is inappropriate for the federal courts to allow a possible cost award to be used by the State of Washington to deter non-frivolous constitutional claims by indigent prisoners whose entire estates could be consumed by a costs bill. The court held it could also deny costs where there was a disparity of resources between the parties. Noting that the State of Washington has virtually unlimited litigation resources while the indigent prisoner has none, that factor also applies. The court again noted that had Hemphill objected promptly "costs may well have not been taxed against him."

Hemphill sought a TRO preventing the DOC from freezing or withdrawing money from his prison account to pay the costs imposed in this case. "The court's research has disclosed no statute, WAC or case law which expressly permits the Department of Corrections to unilaterally withhold funds from a prisoner's trust account to be applied to costs awarded to individual defendants in an unrelated

civil action without due process or court authorization.

"It may be that the individual defendants, who individually recovered costs, could apply to this court for the issuance of a writ of garnishment or other process to attempt to recover their actual out of pocket costs from a prisoner's account. However, in the event of such action, the prisoner would be entitled to contest the matter, and at a minimum, would also be entitled to the same exemptions from attachment by writ of garnishment as would a non-confined person."

Because of this, Judge Quakenbush granted the TRO restraining the DOC "from appropriating funds from the Plaintiffs prisoner accounts to apply to the payment of civil action cost bills, *pendite lite*, without a prior order or process of this court." The court has appointed counsel to represent Hemphill on this matter and is currently deciding whether to enter an order making this a Permanent or Preliminary Injunction. So far this decision has not been reported.

See: *Hemphill v. Kincheloe*, Case No. CV-86-953-JLQ.

Washington prisoners will note that the federal courts in the Eastern District now include a general order "Each party shall bear their own costs" in any rulings dismissing a suit. In the Western district the court clerk has an order stating the court clerk will not award costs unless the suit was dismissed on the basis of being frivolous or malicious.

Airway Heights Opens

The Spokane *Spokesman Review* reports that on July 15, 1994, the 1,024 bed Airway Heights Correctional Center (AHCC) officially opened near Spokane, Washington, by accepting its first 40 medium security prisoners. The prison cost Washington state tax payers \$113 million to build and was slated to open in November, 1993. In order to save money the state delayed opening it until first April, then November, 1994. By opening it ahead of that schedule the state spent an extra \$5 million, according to associate superintendent Al Ramos. The prison's minimum security camp was closed and its 256 prisoners moved into the prison. The camp closure was supposedly to "save money." Yet it indicates an over classification of prisoners.

AHCC is scheduled to be expanded with two additional living units added by 1997. This will increase the numbers of beds to 1,900. The Washington DOC is currently at 141% of its rated capacity. Mandatory sentences, longer sentences, "3 strikes you're out" sentences and reductions in early release time have all contributed to prison overcrowding in Washington state. According to DOC boss Chase Riveland, Washington will need to keep building and opening a new 1,900 bed prison every 27 months just to keep up with the growing prison population.

Initiative 601, which limits tax increases and expenditures will significantly reduce the state's ability to pay for prison building. The initiative caps growth in state spending but doesn't take into account prison population growth. "Whatever we spend on corrections means there will be less to spend on everything else," Riveland said.

A *PLN* reader recently transferred to AHCC states that the first chain of prisoners to arrive on July 15, 1994, was told they would have to ship out half their property because there was "no storage space" in the new prison. No fans were allowed. Some 150 WSP prisoners are scheduled to go to AHCC. It appears that eventually AHCC will house long term "minimum security" prisoners.

S.Ct Distinguishes Habeas and § 1983

The two most common suits filed by state prisoners in federal courts are 28 U.S.C. § 2254 habeas corpus petitions which challenge the length or legality of confinement and 42 U.S.C. § 1983 suits which seek money damages for civil rights violations. There are important procedural differences between the two types of action. Federal habeas actions require that a petitioner first exhaust state remedies by presenting his claims to a state court before entering federal court; it does not allow for money damages. Section 1983, in contrast, carries no such exhaustion requirement. A § 1983 petitioner can file directly in federal court seeking money damages, injunctive and/or declaratory relief for suffering a constitutional violation by state officials.

Roy Heck was convicted in Indiana state court of manslaughter for killing his wife. While his appeal was pending in state court, Heck filed a § 1983 suit in federal court against the prosecutors who convicted him and an investigator with the Indiana State Police. Heck alleged that the defendants had obtained his conviction in an unlawful manner by destroying exculpatory evidence and using allegedly illegal means to obtain his conviction. Heck sought only money damages, he did not ask for injunctive relief nor release from custody. The district court dismissed the suit as implicating the legality of his sentence and thus requiring resolution under the habeas statute. The court of appeals for the seventh circuit affirmed holding that Heck had to exhaust his state remedies first and then proceed with a habeas petition. The Supreme Court unanimously affirmed.

The court, in the majority opinion by Justice Scalia, opted for a simple rule on when federal habeas should be required rather than when § 1983 should be employed. "...in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus... A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgement in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiffs action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgement against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit."

The court states the broad sweep of this ruling. In the absence of court action setting aside a criminal conviction, there

is no cause of action under Section 1983 for events arising out of or leading to a criminal conviction until or unless the conviction is overturned. This resolves any statute of limitations problems because the cause of action, which sets the clock ticking on statutes of limitations, does not start until such time as the conviction is reversed.

Most prisoner litigants may confront this type of argument when challenging prison disciplinary hearings resulting in the loss of good time. The court specifically mentions this issue. In *Wolff v. McDonnell*, 418 US 539 (1974) the Supreme Court held that prisoners can sue for money damages and injunctive relief under § 1983 for the loss of good time in prison hearings. Justice Scalia states that *Wolff* stands for the proposition of holding prison officials liable for money damages for using the wrong procedures (i.e. violating due process) rather than for reaching the wrong results, i.e. denying good time credits. "Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiffs continuing confinement." Thus, this case will not affect civil rights claims seeking money damages for good time lost in prison disciplinary hearings. See: *Heck v. Humphrey*,

Few Programs for FL Women Prisoners

Despite laws requiring that women prisoners receive the same job training in prison as men, Florida spends one third less on women's programming than men's and limits their training to low paying jobs, according to a study released by the Florida House Corrections Committee in March, 1994.

The study reports that the state spends \$1,580 per year for each of the 233 women prisoners in prison vocational programs, about \$800 less than for each man. Training available to women is limited to four fields: cosmetology, book-keeping, sewing and waste water treatment, which is offered at only one prison.

Source: *Corrections Today*, June, 1994

PA Supreme Court Justice Sentenced

On June 13, 1994, Rolf Larsen, a justice on the Pennsylvania state Supreme Court for the past sixteen years, was removed from office and sentenced to two years' probation for arranging to have his doctor prescribe tranquilizers in the name of court workers. He was also ordered to perform 240 hours of community service. He faced a maximum penalty of 20 years on the original charges and he could have received 20 months in prison. Perhaps his lenient sentence was due to the fact that he was a judge.

The state Judicial Conduct Board has also charged Larsen with offenses including lying to a grand jury and giving preferential treatment to friends when accepting appeals. The legislature will continue in their attempt to impeach Larsen so that if his sentence is overturned on appeal he won't be able to resume his job as a Supreme Court justice.

Juries Tougher on Prisoner Litigators in Big Law Suits

by Dale Gardner

In this land of big lawsuits, the growth of multimillion dollar jury awards may have been halted. Juries nationwide have become tougher on people who sue doctors, insurance companies, and prison officials—siding less often with the plaintiffs. There is evidence that the size of the awards has leveled off, too.

In 1992, prisoners won 52 percent of the civil rights cases decided by jury verdicts, down from 63 percent in 1989, according to *Jury Verdict Research*, a legal publishing firm in Horsham, Pennsylvania. They are the only ones to compile such data nationally. The 1993 statistics are not yet available, but preliminary figures suggest the downward trend continued. The firm's research also indicates that despite the occasional colossal award that garners publicity and revives claims that juries have run amok, the size of awards has leveled off.

Theories abound as to why the shift has occurred, but the most widely ac-

cepted seems to be that criticism leveled at juries and their perceived largesse by two of the most affluent defendants—the Justice Department and the prison industry insurance companies—has sunk in.

Brian Shenker, Editorial Director of *Jury Verdict Research*, said, "There's been such a campaign by the prison industry, by people like Janet Reno, saying these big awards are killing our society. People see this in the media, and when they get on juries they think 'I'm not going to contribute to this!'"

James F. McHugh, an associate justice of the Massachusetts Superior Court, said, "There's less of a sense among juries that it's other people's money we're dealing with." Jurors, he added, "...are aware that we all pay these costs" in the form of increased liability insurance premiums.

The acid test of this attitude, lawyers and judges say, is in prisoners' rights cases, in which individual plaintiffs are often pitted against corrections defendants and, almost invariably, against the defendants' high state attorneys. By contrast, practitioners say, jurors' attitudes have not changed in cases of civil rights and contract disputes.

Some lawyers, like Michael Wallace, president of the Pennsylvania Trial Lawyers Association, say they have seen no evidence of greater jury skepticism regarding prisoners' claims. "Jurors still do what's right," he said. "I think the prison industry message is being filtered through some very observant eyes."

But the numbers tell a different tale. From 1961 to 1991, a prisoner's chance of prevailing at trial in civil rights suits changed remarkably little, never rising above 63 percent or falling below 57 percent in any year. Then came the drop to 52 percent in 1992.

"I've seen a kind of conservatism among jurors, and you get defendants verdicts that you might not have a few years ago," said Justice Cappy Marshall of New York State Supreme Court in Manhattan. "Jurors say they're very concerned about the high [dollar value] verdicts you read about in the newspaper—though they don't ever hear about the verdicts for the defendants—and they're very concerned."

Stephen H. Mackauf, Chairman of Pennsylvania Legal Rights Committee of the Philadelphia Lawyers Guild, said, "Now when I question jurors, I find they come in with negative opinions about lawsuits, where they didn't used to." Mr.

Mackauf and other trial lawyers said the change is most noticeable among middle class jurors, many of whom are working professionals paying liability insurance premiums, and perceive rising prison system costs and jury verdicts.

Michael Mone, president of the Massachusetts Bar Association, said that prisoners aren't the cause, but television advertisements for personal injury and civil rights lawyers may have enhanced the trend. "I think jurors are offended by some of that advertising," he said. "It makes them tend to look askance at the cases that are in front of them."

Jury Verdict Research's figures show an especially stark shift in juries' sympathies in cases of premise liability (including "slip and fall" cases) and prison assault cases, which in recent years have accounted for 25 percent of all civil rights trials. Several trial lawyers also suggested that people who were hit hard by the recession might have become less sympathetic to prisoner civil rights plaintiffs. But people in the legal profession agree that the shift in jury sentiments is not the result of any increase in frivolous lawsuits.

G. Marc Whitehead, a Philadelphia trial lawyer who was co-chairman of a Brookings Institution conference in 1992 on the future of the civil jury, said the sense among lawyers "is that litigation is actually down overall," and added, "People find it's too expensive, slow and difficult."

Two Dead in CT Riots

At 6:45 PM on July 12, 1994, 200 prisoners were in the recreation yard of the medium security Carl Robinson Correctional Facility at Enfield, Connecticut. For reasons not reported to *PLN*, a number of prisoners put on hoods and used makeshift weapons to hunt down and beat other prisoners. By 10 PM that evening, when fully armed state police tactical teams in battle dress broke through barricades erected by prisoners, two prisoners were dead and fifteen injured. Two guards suffered minor injuries.

The recently opened prison houses prisoners in dormitories so that after the riot prison officials could not secure the prisoners in cells. The prison holds 1,060 prisoners. The riot is the latest in a wave of riots and rebellions which have swept Connecticut prisons in the past year. Much of it, according to prison officials, is "gang related."

Prison TV: Luxury or Management Tool?

By Paul Wright

In March 1994, the Florida state legislature passed a law severely restricting how the DOC could spend prisoner welfare funds. It specifically prohibited the expenditure of welfare funds for cable television, to rent movie videos, televisions, VCRs or purchase other electronic entertainment equipment for prisoners. The law was passed on a 37 to 1 vote in the state senate. Corrections officials predicted the move would lead to more violence in state prisons unless the legislature provides other activities to keep prisoners busy.

The Florida DOC does not allow its prisoners to privately own television sets. This law effectively removes all televisions from Florida state prisons. Only a handful of the state's 65 prisons had cable TV. Lawmakers claimed not to like the idea of prisoners watching TV, movies or playing video games.

In Massachusetts former federal prosecutor William Weld was elected governor as a hardline republican vowing to "get tough on crime." One of his campaign pledges was to rid the state's prisons of television sets (one of the other pledges was to restore the death penalty). As of this writing it is unknown whether he has accomplished this or not.

In Michigan state prisoners recently sought, and obtained, an injunction from Ingham County Circuit Court Judge James Giddings ordering televisions to be made available for purchase. For years the Michigan DOC had allowed prisoners to purchase televisions, then in the months before June, 1994, the DOC did not make televisions available for purchase on its commissary. Judge Ingham's order of June 8, 1994, in *Cain v. Glover*, Docket No. 88-61119-AZ and 93-14975-CM reads in relevant part: "It is further ordered that Section III.B. 16 of PD-BCF-53.01 is amended to provide as follows: A prisoner may purchase a television set selected by the Department through the institution, equipped with earplugs or earphones, with a price limit of \$140."

In Washington state one of the little noticed provisions of the so-called "Youth Violence Initiative," signed into law by Governor Lowry during the 1994 legislative session, was language which prohibits the DOC from showing "X" or

"NC-17" rated and non-rated movies in adult prisons. "R" rated movies cannot be shown in juvenile prisons.

Martin Tankleff, a *PLN* subscriber in Dannemora, New York, sent us the following letter: "Effective May 26, 1994, the Clinton Main Facility implemented the in-cell TV program and sold the first units. The program is in place at other New York state prisons; Wende, Southport-Cadre, and Attica, the scene of one of the worst riots in history. After the program was initiated in the other prisons, the administration at Clinton put the vote to the prisoners in August of 1993. What was funny was that within an hour of taking a paper ballot vote, the prison administration came up with numbers in favor of the in-cell TV program.

"The program has a catch, it is a give and take deal. Once the in-cell TV program is in effect, packages from family and friends are limited to only two a year. A prisoner can now receive only 20 pounds of food on a birthday and the holiday of his choice. All other packages, such as clothing and toiletries, must come from approved sources such as manufacturers, stores and mail order catalogs.

"It is my opinion that the reason for the enactment of the in-cell TV program is to reduce the amount of violence inside prison walls. Perhaps that explains why the only other New York state prisons with personal televisions are those that have a history of violence. Administrators feel that if a prisoner has a TV the likelihood of that prisoner violating prison rules will be minimized. Why? Because one of the rules of having a TV is that if the prisoner gets a Tier II or Tier III ticket (the most serious levels of disciplinary violations), he loses his televisions privileges. Also, there will be no violence concerning crowded yard TV's and more time will be spent in cells, avoiding contact with other prisoners. So far, it appears to have worked in the other prisons. Now let's see how it works in New York's most violent prison."

In 1992 while I was at the Clallam bay Correction Center (CBCC) in Washington state the administration began a program of providing free state owned televisions to those prisoners unable to afford one of their own. CBCC was then in the process of being converted into a maximum security prison with the accompa-

nying restrictions on prisoner movement and recreation activities. A similar program was implemented in 1993 by officials at the Washington Corrections Center in Shelton, WA.

While legislators in Florida are removing TV's prison officials in Washington are giving them away (albeit with money from the Inmate Welfare Fund) and in New York they are being allowed at selected facilities. So is TV the opiate of the prisoner masses or the lap of luxury? A number of people, including some prisoner activists, believe it is the former.

A prison activist in Wisconsin would like to actively seek the removal of all televisions from that state's prisons. He is of the view that television results in prisoners sitting in their cells, stupefied, and not taking any steps to improve themselves or their situation. It is easy to say that prison officials must agree with this view or they would not allow TV's in prison. The drawback to this type of approach is that just having the state take away televisions does not build any type of social consciousness. In preparation for this article I asked a prisoner who's been doing time since the mid-50's "what did prisoners do before TV?" and he replied that they listened to the radio. All the complaints leveled against TV in prison now was said about the radio then. The problem lies not with television as such but rather what is shown on it. To the extent that programming reflects the dominant political and economic structure and values then of course it is an indoctrination tool of the worst sort, witness the proliferation of right wing corporate ideology masquerading as "news", i.e. *McNeil Lehrer*, *Rush Limbaugh Show*, etc. Whether or not prisoners watch TV has nothing to do with their level of political consciousness, that comes from study and struggle.

The prisoner rights movement can be characterized as the struggle for "more". Whether it is more rights in the way of mail, religion, court access or more privileges such as recreation, visits, and yes, television. While I myself wouldn't lose any sleep if TV's were removed from all prisons, including my own, I don't think that prison activists should support anything that eliminates any of the privileges or rights that have been gained over decades of struggle. One point about televi-

sion is that anyone who wants to be in tune with what passes for popular culture and debate needs to be aware of what is going on, that is reflected on television which is where the majority of Americans get all their information and news. I watch virtually all programs purporting to deal with prison or criminal justice issues simply because I have to be aware of what images are feeding the public's perception of prisons and prisoners. More than one article has resulted from this. To counteract the mainstream media's distortions you have to know what they're saying in the first place. Most prison officials would be loathe to get rid of TV's for their own reasons. Given the current anti-prisoner hysteria any type of accommodation to the "take away" types will easily backfire. Note that so far most legislatures are taking away education, weights, visits, etc. but keeping the televisions. That should say something.

FL DOC Corruption

The July 1, 1994, edition of the *Tampa Tribune* reported that graft and corruption permeate the Florida DOC's purchasing system. As an example, the story reported that an investigation by the state inspector general discovered the Florida DOC paid \$5.42 for a single tube of Pepsodent toothpaste. The amount was paid even though the tubes still carried a drug store price tag of 97 cents. The toothpaste is purchased for Muslim prisoners because it does not contain pork by-products. The March 15, 1994, report from the inspector general stated that Glades Correctional Institution (GCI) spent \$8,453 on toothpaste for approximately 100 Muslim prisoners between May, 1992, and August, 1993.

Despite finding a pattern of overpricing by C&C Industrial Supply, the Belle Glade company that sold GCI the toothpaste, the prison system continues doing business with the company. Florida Comptroller Gerald Lewis was never notified of the findings despite the fact that C&C has done over \$608,000 worth of business with the DOC and other state agencies in the past three years.

GCI's purchasing manager, who approved the purchases is a personal friend of the C&C president. Their relationship was a key issue in the investigation, yet

the manager was never disciplined. The inspector general is now conducting a probe into the DOC's buying habits.



News In Brief

WA: On June 3, 1994, former King County (Seattle, WA) jail guard Andre Gantt, 35, was sentenced to 26 months imprisonment after pleading guilty to two counts of possession of a controlled substance with intent to deliver. The drugs in question were cocaine and marijuana which Gantt was smuggling into the jail to give to prisoners. About 100 of Gantt's former co-workers, guards at the jail, signed a petition asking the judge to give Gantt the maximum sentence allowed by law, claiming that his actions had endangered them. **CA:** The California DOC earned approximately \$6.2 million in telephone commission kickbacks from calls made by prisoners. **WA:** On June 5, 1994, three prisoners in the Yakima county jail climbed through the ceiling of their unit shower and escaped through the roof by climbing down a braided sheet rope. Two of the prisoners were being held on first degree murder charges. **WV:** On June 30, 1994, Robert Shepard used dental floss to braid a rope which he used to scale an 18 foot fence and escape from the recreation yard of the South Charleston, West Virginia jail. Shepard, awaiting a preliminary hearing on robbery and weapons charges, was the first to escape from the year old, 300 bed jail. Jail officials have taken dental floss off the commissary list. **MD:** Kirk Bloodsworth, who spent 9 years on death row for a rape murder he was eventually acquitted of, has been awarded \$300,000 by the state of Maryland as compensation for the prison time he served. Bloodsworth was convicted and sentenced to death in 1985 of raping and killing a 9 year old girl. His conviction was overturned in 1987 and he was again convicted and sentenced to life imprisonment. Prosecutors dismissed the case after newly discovered genetic evidence proved that Bloodsworth could not have committed the killing. The genetic testing was not available at the earlier trials. **WA:** Before being hanged by the state, convicted triple murderer Charles Campbell was given the anti-depressant Elavil. After the autopsy revealed Elavil in his sys-

tem, prison officials told local media that Campbell had been depressed about his pending execution. **USA:** The General Accounting Office issued a report June 28, 1994, stating that white collar criminals, mainly those responsible for the collapse of the savings and loan industry, owe the federal government \$3.6 billion in criminal fines that will likely never be collected. The Justice Department reports that half of the \$3.6 billion is owed by people convicted of financial institution fraud and says many of these offenders now have no money to pay the fines. **OH:** Thomas Rice has been appointed head of the Ohio DRC's "gang control unit." Rice recently retired as superintendent of the Ohio State Patrol after 33 years. In his new job Rice will develop strategies to deal with "gangs" and "security threat groups," i.e. prison organizers and activists. Arthur Tate, who as warden of the prison at Lucasville presided over the longest prison siege in U.S. history in April, 1993, has been appointed warden of a new medium security prison complex being built near St. Clairsville, OH. Tate is held responsible by many Lucasville prisoners for worsening conditions that led to the rebellion. Since December, 1993, Tate has been the Ohio DRC's chief inspector. **CT:** On June 10, 1994, Connecticut governor Lowell Weicker suspended operation of the state's boot camp style school for troubled youth because of drugs, fighting and gangs. The first federally funded program of its type in the nation, it was troubled from its opening by fistfights, sex, drug use and gambling said state attorney John Bailey. The camp was run by the state national guard and purported to help high school drop outs earn GED's in a military style boot camp. The state had received \$4 million to operate the camp for its first year and graduate 400 "students." **USA:** Seeking new things to do with tax payer money, the Sandia National Laboratory has come up with the idea of sticky foam, a confetti like foam that envelopes people like a liquid strait jacket, immobilizing them. Sandia plans to market the foam to police and prison agencies. The Department of Energy announced plans to test the goo-like foam in federal prisons later this year. **GA:** On July 12, 1994, 200 prisoners in Oglethorpe took over two buildings at the Macon Correctional Institution. The rebellion ended four hours later after guards in riot gear stormed the buildings.

From The Editor

By Paul Wright

Welcome to another issue of *PLN*. In the March, 1994, issue of *PLN* we started the *News in Brief* column which carries little tidbits we think readers might be interested in but which either don't merit an article of their own or that we don't have enough information to do an article on. When we started the column I asked for feedback on whether readers liked it or not. So far no one has commented on it one way or the other. I'd like some feedback on whether or not you would like us to continue the column or drop it.

Recently we have had requests from folks offering things for sale that wish to trade or rent *PLN's* mailing list. This has not come up before now. We haven't done anything about it because I wanted to make sure that we gave readers who don't want their names and addresses divulged a chance to let us know so that we can remove them from any lists that we decide to rent or trade. I have had doubts about the wisdom of renting/trading our mailing list. On the one hand, most people dislike junk mail. On the other hand, *PLN* is also seeking to trade mailing lists with other groups and publications so we can do sample mailings of *PLN* in an effort to let more people know about us. The reality is that this type of direct mailing is about the only way that small publications like ours can make themselves known for a relatively small amount of money. If for any reason you don't want your name and address divulged to any third parties by *PLN* let us know. Most of our BOP readers recently should have received a complimentary copy of Alan Parmalee's *How to Win Prison Disciplinary Hearings*. We provided him our BOP mailing list so he could send a free copy of his booklet to those who need it the most. Because of the important information he provides, and the fact that it was a freebie, we didn't think any of our BOP readers would mind. This is an example of who needs or wants to send stuff to *PLN* subscribers. Under no circumstances will we be divulging our mailing list to government, snout or reactionary agencies/ groups. So far everyone that has expressed an interest has been people already involved in prison support work.

In the last few months we have been getting complaints of non-delivery from

prisoners at Waupun CI in Wisconsin and throughout the Texas DOC. In the past we have had problems with the Texas DOC and Waupun, we complained about it then and it went away for a while. We have written to the respective DOC administrators about this problem. What appears to be happening is that *PLN* simply "disappears" with no type of notice of censorship or an opportunity for any of the parties to appeal it. This is an unconstitutional practice. Any *PLN* reader affected by this practice should file the administrative complaints provided by the prison system they are in. This helps establish liability as well as attempting to resolve the problem quickly. If you decide to file suit, *PLN* will provide you with affidavits verifying that you are on our mailing list, the address *PLN* was sent to and that no notice was received by *PLN* stating an issue was censored for any reason. The legal presumption is that correctly addressed mail reaches its destination. Prison officials will have a harder time claiming *PLN* was lost "inadvertently" or by the post office when it can be shown to affect all *PLN* subscribers at a given prison (Waupun) or through the state (Texas). If you are having this type of problem please contact me if you haven't already.

We've already had one Waupun reader state that he was not renewing his subscription because of the harassment by prison officials in getting his copies. It should be apparent that there's a reason they don't want prisoners to read *PLN*, the fact that they won't openly censor it, i.e. specifying their reasons and providing an opportunity to appeal, etc., indicates they don't think they have much of a basis to censor *PLN*, at least not one that will hold up in court. I think it's kind of pathetic to give in to that type of behavior but that's just an opinion.

A new and rather unique business catering to prisoners has opened up, Gina's Floral Service allows prisoners to send floral bouquets, fruit baskets, colognes, etc., to friends and loved ones anywhere in the country with personalized messages. For full information on the wide range of services offered, costs, etc. write: Gina's Floral Service, 8951 Bonita Beach Rd. Suite 525-263, Bonita Springs, FL 33923.

As always, we still need donations and new subscribers so if you haven't donated

lately or your subscription is getting close to running out please donate what you can. By renewing your subscription a few months in advance you save us the time and expense of having to write and tell you it's time to renew. Your mailing label will let you know if you are close to your last issue. Let others know about *PLN* and encourage them to subscribe too. Enjoy this issue.

Justice for Mark Cook - It's Way Past Time

The Vietnam war was fought not only on the soil of Southeast Asia, but in the streets of the U.S. as well. Anti war activists struggled to end a conflict they knew to be unjust and extended their fight to include justice and equality for all human beings. Some felt compelled to take measures outside the law to stop a war between governments that killed thousands weekly in Vietnam, and to end the war of racism and poverty that claimed countless more lives in this country.

Mark Cook, a native of Seattle, was an officer of the Black Panther Party, which established community programs such as breakfast for children, free food giveaways, and medical clinics. With his founding of groups such as CONvention and the Bridge Project, Mark helped prisoners and ex-prisoners through establishing job training programs in prison, supporting prisoners' labor rights struggles, and creating job placement programs for those recently released. Throughout the late sixties and early seventies, Mark struggled to end not only the Vietnam War, but the systems of racism and imperialism that caused that war.

Across America activists challenged the war on a variety of fronts: electorally, non-violently, and militarily. In Seattle, the George Jackson Brigade (GJB) waged an armed struggle, targeting the property of those who perpetuated injustice. In January of 1976, three members of the GJB were arrested in a Brigade-sponsored bank robbery attempt, where one GJB member was fatally shot and another hospitalized. Two months later the hospitalized member was rescued from custody. In the process, a King county sheriff was shot and wounded. A few days later, Mark Cook was arrested as a suspect in the bank robbery. Months later he was also charged with aiding the

escape and shooting the officer. He was convicted of all charges and sentenced to serve a thirty year federal term and two life sentences plus ten years by the state. Mark has never admitted guilt in any of the charges against him.

Mark has served nearly twenty years for actions intended to stop an unjust war, far beyond the average served by persons convicted of similar crimes. Throughout the past two decades of incarceration, Mark has continued to strive for justice and equality for those behind bars and on the outside. He has never renounced his political beliefs. Mark has served the time for his crimes; he continues to be jailed only because of his politics.

Washington State has ignored a court order to have Mark's federal and state sentences run concurrently. As such, he is only on the first year of his state sentence(s)—even though a codefendant in the case [Ed Mead, co-founder of the *PLN*] served his state and federal terms concurrently and was released last year. The Washington parole board refuses to review his case.

Beginning with the pardoning of draft resisters in the late 1970's and ending with this year's lifting of the trade embargo with Vietnam, one of the most discordant periods in recent U.S. history has nearly been reconciled. If the time has come to heal the rift between two warring nations, isn't it time for a nation to reconcile its' differences with its own citizens who opposed that war?

The Mark Cook Freedom Committee (MCFC) plans future letter writing campaigns to the WA State parole board (and governor if necessary), and a fund raising drive to hire a lawyer to file Mark's appeal. If you would like to be placed on the MCFC mailing list to be notified of future events and kept up to date on Mark's case, write to: The Mark Cook Freedom Committee, P.O. Box 85763, Seattle, WA. 98145-2763.

Letter From Mark Cook

I appreciate the political support folks want to give regarding my case and will compliment it whenever I can. I will mostly focus on the legal aspect and do the major portion of that work with the attorneys. As of this date I have still not received any paperwork from the ISRB [Parole Board] concerning my minimum term status. I don't disagree with the 196 month decision, but only the "time start" date they set. [His state time and federal

time should have been set concurrently, as Ed's was, which would entitle Mark to immediate release.]

My input on the "political line" to take involving my case may not agree with yours. The issue is not Mark Cook's case but the historical conditions that were the impetus of Mark Cook's activities and the actions of all political prisoners and POW's.

The impetus of the various social-economic-political movements of the late '60s and early '70s was the Viet Nam War. It was a war the U.S.A. had no justifiable cause of involving its military. Television allowed the young people to witness the ravages of that war as well as the older peoples' debates as to whether we should or should not be involved. This began a division in the consciousness and the patriotism of both young and old on the injustice of the war. Some folks were just peace-niks and were against all war, some saw racism in America's war on Vietnamese and other Asians because of a communist philosophy, yet they would not war against European communists. Women saw the participation of Viet Nam's women in all aspects of the war and drew feminist inspiration to fight for justice. We who suffer injustice here in the U.S. found common cause with those who suffered injustice from B-52 bombers and such.

It was the common cause of injustice that was the true impetus for the movements of the 1960s and 1970s. It was the same Red Book of Mao that gave the Vietnamese people the political inspiration to challenge the injustice of the U.S.A. that gave the Black Panther Party and other leftists groups their inspiration. The common cause was so strong among the Panthers that the BPP volunteered to send members of the Party to fight for the liberation of Viet Nam. It is immaterial that the offer was graciously rejected, the Panther Party was then in active support against the U.S.A. in that war. This is merely a demonstration of how intertwined the left in the U.S.A. became with the left of the communist world. We saw the left politics as our salvation against racism, sexism, poverty and serfdom to capitalism.

This impetus affected the Weatherman movement, A.I.M. movement, B.L.A., B.P.P., and even the moderate movements led by Martin Luther King. This analysis of the political history of the '60s and '70s is not speculation. It is not only what happened then, it points to what will happen in the future if the U.S.A. involves itself in another Great War—unjustly!

In sum, the political prisoners and prisoner of war in U.S.A. prisons are unjustly imprisoned as criminals. Common cause draws the militant as well as the moderate. We cannot support injustice in any form. When we choose not to support it in foreign countries we are bound not to support it at home.

The Viet Nam war ended and caused the demise of the common cause within the U. S.A. 's left and the non-initiated grass roots movements. Many of us struggled on militantly and many ended up in prison. I, as many others, was part of a political movement striving for justice in an unjust U.S.A. As my African-American ancestors before me, I was born into a racist society and I will die in a racist society. My children and grandchildren will suffer the same hurts and injustices, yet they have the right to fight against injustice with moderation or militancy, and they must never be ashamed of their political positions because actions in support of justice are never criminal.

The former members of the George Jackson Brigade must define themselves and their politics. In the 1970's it was my duty and responsibility to find out who and what the GJB was because they were using the name of an honored and martyred brother, a political theorist and Field Marshall of the BPP. I did find out who they were and what I believe they were about. I gave them my full support as a member of the BPP and out of my own personal convictions. I'll not say what specific support I gave them. But because of my position as a BPP member I was fully responsible for every action taken by the GJB *before* and *after* my imprisonment as if I were an active participant.

From the heat of the Viet Nam War, the social-political-economic movements of the left soared like eagles over the land, and when the war ended those updrafts of common cause ended. People must acknowledge this reality before they can truly understand why the political prisoners and prisoners of war exist in the U.S.A.

It is important to me that if you wish to take a political line in support of my freedom, you must understand, at least in part, that we stood in common cause with millions though we fell alone in prison.

As to the "line" on my innocence. It is simple; I'm innocent of the criminal acts but guilty before and after the facts. I've done enough time from any perspective.

Have faith in the people!

Comrade Mark

International Prisoners Unite to Save Mumia Abu Jamal: Art and Writings Against the Death Penalty

We are writing to you as well as many other political prisoners internationally to ask you to join us by contributing your best creative energies to the fight to save our brother, US political prisoner Mumia Abu Jamal, from execution.

Mumia was a prominent member of the Black Panther Party in Philadelphia and later distinguished himself as a radio journalist. Known as 'The Voice of the Voiceless,' Mumia spoke out on behalf of the poor and oppressed, particularly those of Philadelphia's Black community. In the late 1970's he was the sole reporter daring to defy the notoriously racist Philadelphia police to air the truth about their persecution and subsequent armed assault against the radical organization MOVE. As a result, Mumia himself was targeted. In 1981 Mumia witnessed and intervened when he saw the police beating his brother on the street. In the ensuing struggle, Mumia was shot and critically wounded in the abdomen; the cop was killed with a bullet from his own gun.

During his last 12 years on Pennsylvania's death row, Mumia has been a tireless activist against the death penalty. He has continued his journalism, publishing regular columns in newspapers around the US. He is a jailhouse lawyer for many of the young men with him on death row who are largely there because adequate legal counsel wasn't given to them at trial.

The warrant for Mumia's execution now sits on the desk of Governor Robert Casey, awaiting his signature; Mumia's appeals are all but exhausted. The right-wing, led recently by Republican Senator, and probable Presidential candidate Bob Dole, has been vehement in hastening the date of Mumia's execution. In June, Dole and law enforcement lobbyists were able to intimidate the National Public Radio (NPR) network into dropping a scheduled series of interviews with Mumia. They are trying to ensure that there is no chance of a national outcry against what would be the first execution of a political prisoner since Ethel and Julius Rosenberg were electrocuted.

We are calling upon you, political prisoners in the US and around the world, to answer this fascist drive to execute Mumia Abu Jamal with internationalist solidarity. Join us in presenting: *"International Political Prisoners Unite to Save*

Mumia Abu Jamal: Art and Writings Against the Death Penalty" a series of events scheduled for the week of December 10, 1994 (International Human Rights Day.) Included in the activities will be an Arts and Crafts Show/Sale, dramatic presentations, readings of poetry and creative writings and other cultural works by current and former political prisoners. We are contacting actors and musicians on the street to read and present works authored by all of us behind the walls. We hope to raise money for Mumia's legal defense through the sale of the artwork and crafts and to publish a collection of the submitted writings in a book which would also be made available for sale. More importantly, we hope that by joining our voices from behind the walls, we can undertake one unified action in solidarity with a comrade who has always raised his own voice in defense of the oppressed.

We ask you to submit:

Artwork (drawings, paintings, etc.)

Crafts

Poetry

Rap

Essays

Short Stories

Plays

Send your artwork, crafts and/or writings by **November 1st** to: Mary Taylor,
164 Lexington Ave.

Jersey City, New Jersey 07304

(201) 435-3244

If possible, please write or otherwise contact the above address in advance to notify her of what will be sent. Please note that all original artwork will be made available for sale and reproduction unless otherwise noted. Similarly, receipt of written materials will be assumed to mean that we have your permission to print, publish and reproduce your submission for sale. Again, all proceeds will benefit Mumia's legal defense efforts.

FREE MUMIA ABU JAMA!

ABOLISH THE DEATH PENALTY!

Alberto Rodriguez

Kojo Bomani Sababu

Jihad Abdul Mumit

Hanif Shabazz Bey

Larry Giddings

Abdush Shakur

Ricardo Jiménez

Tim Blunk

Sundiata Acoli

South American Prison News

Brazil: According to the Brazilian Ministry of Justice there are an average of two and a half riots a day in Brazilian prisons and jails. The Brazilian prison crisis became evident on March 15-16, 1994, when the Archbishop of Fortaleza was taken hostage by prisoners, along with 14 other visitors, during a prison visit. Fr. Francis Readon, coordinator of the Prison Pastoral of the Sao Paulo Archdiocese said prisoners rebel when they are frustrated. The main reasons for this are the lack of judicial help, lack of a health system along with the daily violence suffered through torture, beatings and other punishments. Readon said he felt there would be more riots and hostage takings as long as the state continued its policy of not treating prisoners like human beings and citizens. On July 7, 1994, 10 prisoners at the Porto Alegre prison took 24 staff members hostage in the prison hospital. On July 8, 1994, the prisoners, armed with revolvers, escaped from the prison with at least nine hostages in vehicles provided by prison officials in response to their demands. In a series of running gunfights outside of the prison in the city eight of the prisoners and a policeman were killed. The escape ended on July 10, 1994, when the two surviving prisoners surrendered in a luxury hotel and released the last of the three hostages.

The reality of Brazilian prisoners includes a lack of legal assistance, violence, corruption by staff in which police and guards take from the prisoners what their families send them. A major problem is AIDS. One fourth of male prisoners and one third of female prisoners are HIV positive. In the two prison hospitals for the city of Sao Paulo there are always at least 40 AIDS patients, most of them terminal. The Brazilian government is in the midst of a major prison building campaign. [PLN has reported on Brazilian prisons in the past, see Vol. 4, No. 1.]

Ecuador: On June 6, 1994, over 600 Ecuadorian and foreign prisoners began a hunger strike at the Center for Social Rehabilitation (a prison) in Quito, Ecuador. They are demanding faster court hearings and trials. One of the strike leaders was quoted as saying "There are comrades who have been in prison for six years and have never appeared before a judge, others are ready to finish their sentences

without having ever been convicted." Prisoners have carried out three other hunger-strikes in the past two years with similar demands, without success. The Center for Social Rehabilitation holds 150 of the more than 550 foreigners held in Ecuador. The foreign prisoners include citizens of the United States, England, Canada, Germany, Argentina, Australia, Bolivia, Colombia, Spain, Honduras, Italy, Chile, Haiti, Peru, the Dominican Republic and others. According to the Tribunal of Constitutional Guarantees, over 70 percent of those held in Ecuadorian prisons are held on drug charges, have been held without being convicted for an average of four years due to the slowness of the judiciary. Ecuador has 9,000 prisoners.

Chile: According to a report released by the Chilean Ministry of Justice, adult prisons in that country held 4,375 children as of April, 1994. Of these, 153 were younger than 11; 1,235 were between 12 and 15 and 2,739 were between 16 and 17 years old. Prison officials state that 77% of the children are charged with property offenses; 6% with crimes against people; 5% for vagrancy; 6% are held under anti-terrorist, drug or weapons laws and the remainder for alcohol offenses. Of the children held in adult prisons only 45% were found to have violated any laws once they were brought before a judge, a process which took, on average, between one and five days.

Chilean government officials have vowed to end the practice of housing children in adult prisons with adult offenders. Their solution: to build \$28 million worth of juvenile prisons with special staffing to ensure Chile meets its obligations under the International Children's Rights Convention which states that juvenile prisoners have a right to health, education and rehabilitation.

Uruguay: On June 7, 1994, prisoners at La Libertad (Liberty) prison in Uruguay rioted to protest subhuman prison conditions, overcrowding and corruption. A leader of the 900 prisoners told the Uruguayan weekly *Brecha* "We want better conditions without hurting anyone. Our only goal is to bring citizen's attention to this." From 1973 to 1985 the prison was used by the military dictatorship to house political prisoners; no one escaped during this time. Since 1985 when a civilian government took power and used it to house social prisoners, there has been an average of one escape a week. Prisoners claim

it costs between \$2,500 and \$20,000 to "escape".

Uruguay has 3,200 prisoners, 85% of whom have not been convicted of any crime. They are held in conditions of severe overcrowding (cells designed for one or two prisoners hold five or six), locked down 21 hours a day, many cells lack water and/or electricity, most prisoners are between 20-26 years old. Convicted and non-convicted prisoners are held in the same prisons. While most reading material is banned from the prisons, drugs, alcohol and weapons flow freely.

The prisoners demands are for half time for all convicted prisoners, automatic release time for terminally ill prisoners and those over 60; that the Supreme Court visit each prison annually; that all charges be combined to give prisoners one sentence to serve; prompt trials within 120 days with the trial taking no longer than one year and that prison officials follow laws regulating prisoner's rights.

In late July the Uruguayan government announced it was going to transfer all of Libertad's prisoners to other prisons while the prison is rebuilt and the riot damage repaired.

Mexico: On June 21, 1994, prisoners at the Mexicali state prison, in Baja California, rioted after a fight between prisoners escalated. Five prisoners were reported dead and four wounded in the melee. One prisoner reported that the fight erupted as part of a war between a drug trafficking faction of prisoners and a faction seeking better conditions for prisoners after a June 6, 1994, riot over abuses and bad conditions at the prison.

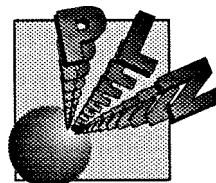
The "Correcting Corrections" Project Distributes Prison Video Documentaries

Community activists in Madison, Wisconsin have joined together to develop the *Correcting Corrections* Project. *Correcting Corrections* combines art and journalism to create a series of educational videos, to organize community meetings, to arrange for radio and cable television broadcasts, and to stimulate media coverage which will inform the public about prison and jail issues.

Prisoners, former prisoners, visitors, staff from prisons and jails, legislators and community workers describe their experiences by attending town meetings and giving interviews for the videos. This grassroots effort hopes to open serious and critical public dialogue to examine and challenge existing penology. Although the focus is on Wisconsin, the content is relevant nation-wide. Two videos have been released so far, Part III is in production and more videos are planned.

Video co-producers Glenn and Jackie Austin and Marshall Weber are independent video artists working on prison issues. (Jackie is also the President of Wisconsin-CURE, Inc.) They have released two half-hour shows, both available on a one-hour VHS tape. Part I, *Crimes of Punishment*, is a documentary giving an overview of the problems in prisons and jails. Featured in the video is the story of Adrian Lomax, a Wisconsin prisoner placed into segregation for writing a newspaper article which allegedly jeopardized staff and prison security. Also featured are community workers, prisoners and former prisoners who raise questions about the practice of American penology today. Part II, *The CIA of State Government*, is a documentary about how a Wisconsin prisoner named Donald Woods was killed by staff at the Waupun Correctional Institution in September 1990 and the killing was covered up. The video examines the whitewash of this killing, the protests against it, and the opposition of the Wisconsin Department of Corrections (DOC) to the establishment of an inmate death review board to investigate prisoner deaths. It was the ability of the Wisconsin DOC to operate without any outside oversight which led one legislator to nickname the agency "the CIA of state government."

Price per VHS tape: \$18.00 + \$2.25 for postage and mailer. (Make check or money order out to INSIDE VOICES, and mail c/o Wisconsin-CURE, Inc., PO Box 9452, Madison, WI 53715. Not tax-deductible, but all proceeds generated by this project will be used to create more public information about prison and jail issues.)



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Retaliation Case Dismissal Reversed

Muriel Black is an Illinois state prisoner. In 1984 he filed suit under § 1983 claiming that prison officials had violated his constitutional rights by filing false disciplinary charges against him, harassing him, etc., after he complained of racial discrimination at the prison. In 1985 the district court dismissed the suit. The court of appeals for the seventh circuit reversed and remanded, finding that Black had stated a cause of action for racial discrimination and that genuine issues of fact remained as to whether he was confined in segregation because of racial discrimination or in retaliation for complain-

ing of such discrimination. See: *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987).

On remand the lower court appointed counsel and the defendants eventually defaulted by not responding to Black's amended complaint in the action. The magistrate awarded Black \$50 for racial discrimination and dismissed substantial parts of the complaint for failing to state a claim, the court also dismissed about half the defendants. Black again appealed and the seventh circuit again reversed and remanded, holding that Black had adequately stated a claim for retaliation and denial of his due process rights. The court notes that ten years after filing suit Black is still at the pleading's stage and still hasn't even gotten to trial.

As a preliminary matter, the court noted that it was improper for the district court to have dismissed any portion of Black's complaint at a hearing for damages without providing advance notice that the merits of the claim would be considered.

The lower court also erred by refusing to abide by the appeal court's previous findings in this case. Under the law of the case doctrine lower courts cannot ignore appeal court's earlier decrees. The lower court compounded this error because by defaulting on the complaint the defendants admitted as true all of the allegations contained in the amended complaint. "When a default judgment is entered, facts alleged in the complaint may not be contested." "...a default judgment establishes, as a matter of law, that defendants are liable to plaintiff as to each cause of action alleged in the complaint." A party who has defaulted can, however, still challenge the adequacy of the complaint.

Even in the absence of the law of the case doctrine the lower court erred in

dismissing the retaliation claim. "To state a cause of action for retaliatory treatment, a complaint need only 'allege a chronology of events from which retaliation may be inferred.'" The appeals court held that Black had adequately pled a retaliation claim by alleging that prison officials at Menard interfered with his assigned tasks, withheld privileges, wrongfully confined him to his cell and issued false disciplinary infractions against him after he complained to the Department of Justice about racial discrimination at the prison. He had also been confined for three days to a hot, flooded cell that had been closed as unfit for human habitation, where he suffered a heart attack.

The lower court erred in dismissing the supervisory prison officials who were aware of the retaliatory acts but who did nothing to prevent them. Because of the default judgment the allegations against the defendants are presumed to be true and were sufficient to sustain liability against them.

The lower court dismissed Black's due process claims that he was wrongfully punished for false disciplinary infractions. The appeals court held that prison disciplinary hearings are invalid if they do not comport with the due process standards set out in *Wolff v. McDonnell*, 94 S.C. 2963 (1974) and if they are not supported by "some evidence" as required by *Superintendent, Mass. Corr. Inst. v. Hill*, 105 S.Ct. 2768 (1985). Thus, a false or unjustified infraction would not be supported by "some evidence" and would be unlawful. Black adequately stated a procedural due process claim on this issue. The lower court also erred in disregarding Black's claim that the retaliatory disciplinary charges violated his substantive due process rights. The court

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Retaliation Case (continued)

cites numerous appellate court cases that have held that prison officials abuse their authority by retaliating against prisoners who exercise their first amendment rights. Black's allegations that he was wrongly infracted and punished for complaining of racial discrimination stated a claim for a violation of substantive due process. In a closing note the court noted that according to the state's own admissions Black had not been treated humanely. See: *Black v. Lane*, 22 F.3d 1395 (7th Cir. 1994).

CBS Liable for Filming Search

This case has nothing to do with prison litigation. We are reporting it because it deals with the ongoing propaganda war being waged against criminal defendants and poor people. It is the first reported court decision to hold a television broadcaster liable for accompanying police agents on a search and filming it for broadcast. Anyone who has watched *Cops*, *Hard Copy*, *America's Most Wanted*, or any of the other "real life" cop shows has seen the degrading and propagandistic manner in which the victims of police repression are portrayed. The broadcasters and the police can be sued and held liable for such actions.

In 1992 Secret Service agents obtained a search warrant from a federal court authorizing the search of an apartment shared by Babatunde Ayeni, his wife Tawa and small son Kayode seeking evidence of a credit card fraud operation. At 6 PM on March 5, 1992, several Secret Service (SS) agents forced their way into the Ayeni residence announcing they had a warrant to conduct a search and ask questions. Only Mrs. Ayeni and her son were home at the time. At about 8:15 PM four more SS agents arrived with a film crew from the CBS News program *Street Stories*. The CBS film crew were never identified as CBS employees. The CBS crew followed the SS agents and taped them as they searched the apartment. They took closeup shots of the home's interior, its closets, personal letters, family photos, etc. In the apartment's foyer an SS agent was interviewed about the modus operandi of people who commit

credit card frauds and the tools of their trade. During this tape sequence the SS agent implied the complicity of the other residents of the Ayeni apartment. No evidence implicating any of the Ayenis in any illegal activity was found during the search. One of the agents was filmed expressing his disappointment.

The Ayenis filed suit against the federal agents as well as CBS contending that the search and its filming violated their fourth amendment rights to be free from unreasonable search and seizure. In his opinion Judge Weinstein agreed with the Ayeni's. Readers will note this is the first published ruling on the issue of private parties filming searches by police officials. The defendants sought qualified immunity, which the court denied.

Under the doctrine of qualified immunity government agents are entitled to be free from liability for money damages even if they violate constitutional rights as long as the right is not "well established" so that a person of reasonable intelligence would know that the right violated was recognized. In this case the court held that any reasonable police agent would have known that it is unconstitutional to have private citizens accompany them on a search to film and broadcast the search. The court relied on 18 U.S.C. § 3105 which requires that search warrants be served by an official authorized to serve the warrant and by no other person unless their assistance is required in conducting the search. Thus, the SS agents should have known that having a film crew taping their activities was illegal. Courts have previously held that taking photos is a "seizure" within the meaning of the fourth amendment. CBS also claimed qualified immunity from suit. The court notes that private entities are not entitled to qualified immunity

from suit, it only applies to government actors.

The court used harsh language in condemning the actions by the SS and CBS. "The search warrant was issued to Agent Mottola and other agents of the United States Secret Service for precise and limited purposes. It authorized their entry into the Ayeni's home only to search for items related to credit card fraud. Agent Mottola's act of facilitating the CBS camera crew's entry into the apartment and its filming of the search exceeded the scope of the warrant. It was allegedly in clear violation of then well established fourth amendment principles....it is the equivalent of a rogue policeman using his official position to break into a home in order to steal objects for his own profit or that of another."

For immunity purposes it would be "...grossly unreasonable for a government agent not to have known that the presence of private persons he invited in so that they could titillate and entertain others was beyond the scope of what was lawfully authorized by the warrant..."

"CBS had no greater right than that of a thief to be in the home, to 'capture' the scene of the search on film and to remove the photographic record. The images, though created by the camera, are a part of the household; they could not be removed without permission or official right... The television tape was a seizure of private property, information, for non-governmental purposes."

It is entirely possible that litigation by the victims of this type of police and media activity may be able to halt the spread of "police TV." Findings of liability against both police and the broadcaster will see to it that police activity is not broadcast to "entertain and titillate." See: *Ayeni v. CBS Inc.*, 848 F. Supp 362 (ED NY. 1994).

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WA DOC Negligence Caused Prisoner Death

By Paul Wright

In the July, 1994, issue of *PLN* we reported on the death of Gertrude Barrow, a prisoner at the Washington Corrections Center for Women (WCCW) at Purdy. On May 16, 1994, Barrow died of a perforated ulcer with acute peritonitis after repeatedly seeking medical care from her captors. After her death the Washington DOC contracted with David Dugdale, its medical consultant, to determine which errors resulted in Barrow's death and how such deaths could be prevented in the future. Dugdale, an assistant medicine professor at the University of Washington, was accompanied by Larry Pogue, a doctor with the Group Health Cooperative and Holly Wallaston, a nurse practitioner and director of nursing at the King County (Seattle) jail. After visiting the WCCW, interviewing the medical staff and warden, the trio issued their report.

The report states that there were communication difficulties between Dr. Badger (the WCCW treating physician) and nursing staff. Better communication likely would have led to better monitoring of Barrow's condition, and hence earlier detection of her deteriorating condition.

There was also misinterpretation of the clinical findings in the case because most of the clinical management was done by a physician's assistant with "at a distance" oversight by Dr. Badger. For example, a small calcification in her left kidney was misdiagnosed as evidence of a kidney stone. This resulted in Barrow being prescribed potentially harmful medications with respect to the ulcer disease. The report concludes this was due to lax oversight of PA Ingram by Dr. Badger. There were numerous errors of omission in Barrow's medical records. For example, her last three admissions to the WCCW infirmary do not have an evaluation, i.e. history and physical by either Ingram or Badger. Such evaluations are standard practice in hospitals and are mandated by WCCW policy.

The report concluded that "there appears to be a serious shortage of health care providers capable of independent diagnosis and treatment of patients." For 540 prisoners WCCW has one physician, one PA and one contract physician. "The sick call load of 40 to 60 patients per day

makes it essentially impossible to do thorough evaluations of each inmate, errors of omission that occurred in Ms. Barrow's case are essentially guaranteed in such a setting." It also concluded that Badger was not supervising Ingram sufficiently well and "Dr. Badger feels that PA Ingram needs close supervision while acknowledging that he does not provide it. This is a recipe for continued, potentially life threatening yet preventable problems."

The study concluded that "Dr. Badger is ill-prepared for the position as medical director of a correctional facility. Based on a review of his job application and our interview with him, it is apparent that it has been a long time since he has been engaged in a primary care medical practice." Badger also lacks experience in administering programs. "His orientation to the special aspects of medical care behind bars was essentially non-existent—it is no surprise things have not gone well." It was recommended that Badger receive orientation from other DOC doctors on how to administer the WCCW medical program and have his clinical load lightened to lead the medical section and implement operation changes in the WCCW infirmary.

The Washington state Department of Health (DOH), which inspects DOC facilities, reached a similar conclusion. The DOH report, quoted in the September 7, 1994, edition of the *Seattle Times*, states that the WCCW health care system did not offer "safe, appropriate" care for prisoners. DOH investigators found 16 deficiencies when they compared the prison's policies with actual practices. The DOH also concluded that WCCW staffing levels did not allow for "reasonable" workloads. Medical personnel did not keep complete records, failed to track Barrow's ulcer condition and did not follow up on previous medical problems. The report also described WCCW hospital staff's flippant attitude towards Barrow, on one occasion Barrow vomited and a nurse gave her a towel and told her to "clean it up yourself." Barrow died later that morning. The DOH recommends that the DOC come up with a plan to correct WCCW infirmary deficiencies within 10 days. However, state laws do not permit the DOH to compel the DOC to comply with its orders nor to take any

action to ensure that Washington state prisoners receive safe, adequate health care.

Gertrude Barrow died of an easily preventable illness due to the incompetence of her health care providers. The sequence of events leading to her death are recounted in the July, 1994, issue of *PLN*. Inadequate medical care is the norm rather than the exception in most prison systems as seen by the amount of litigation on the subject. As reported in the April, 1994, issue of *PLN* there is a class action suit, *Hallett v. Payne*, pending against prison officials at WCCW alleging that the medical care (or lack thereof) at the prison violates the eighth amendment. The suit had been in the midst of settlement negotiations which were abruptly terminated upon Barrow's death. *PLN* will report developments in the litigation in future issues.

Prisoner Mail Trashed at Waupun

In the editorial in the September, 1994, issue of *PLN*, we noted that subscribers at the Waupun Correctional Institution at Waupun, WI, had complained of not receiving their issues of *PLN*. Shortly thereafter we learned why. The August 4, 1994, edition of the *Wisconsin State Journal* reported that postal inspectors had begun to investigate staff members at WCI after prisoners' First, Second and Third class mail was discovered in the garbage. Eleven mailroom guards were temporarily reassigned to other duties pending an investigation to determine why prisoners' mail was being thrown away. Warden Garly McCaughtry was reported saying there were at least 50 pieces of mail involved. As of this writing Wisconsin prison officials have not responded to *PLN* inquires as to why *PLN* has not been delivered to Waupun subscribers when sent via bulk mail. *PLN* has also contacted the US attorney's office about the matter and informed them of the problems related to delivery of *PLN*.

A Waupun reader reports that the corruption and thievery goes even deeper than the trashing of mail may suggest. Stating that one of the mailroom guards, Sgt. Perre, was arrested when a search of his home revealed property items (TV's, radios, etc.) belonging to prisoners. The items still had prisoner DOC numbers engraved on them and were supposed to have been mailed out or destroyed.

"The Forgotten Crime Victim"

by Willie Wisely

In the seemingly unending clamor for revenge against people in prison and those accused of committing a crime, a particularly vulnerable, unchampioned, group remain overlooked. Casualties of America's "War On Crime," a growing number of people have lost their lives to the unchecked discretion of judges, prosecutors, and police, and the indifference of the public. There are no fund-raisers, government resources, rallies, or lobbyists, and little hope for them. Caught between the hidden agendas of politicians, the media, and special interest groups on one hand, and the public's fear of crime on the other, the wrongfully convicted person is the forgotten crime victim.

In their book, *In Spite of Innocence*, Michael Radelet, Professor of Sociology at the University of Florida, and Hugo Bedau, Professor of Philosophy at Tufts University, feature 400 cases in which an innocent man or woman was sentenced to death. By conservative estimates, five-percent of the people in California prisons are innocent. With more and more limited state funds being sucked into the black-hole of the prison building guarding-maintaining complex, less money is allocated to provide attorneys, investigators, experts, and other services to indigent persons charged with a criminal offense. The majority of criminal defendants are poor, and without adequate resources to prepare for trial, some innocent people will be convicted.

Once convicted, the innocent person's problems get much worse. On appeal, all inferences are drawn in favor of the evidence which supports the conviction. Jailhouse informants, who testified for the prosecution at trial in return for leniency or immunity in their own pending cases, are presumed unreliable on appeal if they admit lying to get a deal. In *Herrera v. Collins*, the United States Supreme Court delivered perhaps its most cynical ruling to date. Leonel Herrera, on Texas' deathrow, appealed his conviction on the ground newly discovered evidence proved he was innocent. Justice Antonio Scalia wrote that the execution of an innocent person wouldn't necessarily violate the U.S. Constitution. Chief Justice William Rehnquist, joining in the denial of Herrera's appeal, concluded, "A

claim of 'actual innocence' is not itself a constitutional claim," and has no business in federal court at all.

In his *Commentaries* the renowned English legal scholar Sir William Blackstone wrote, "It is better that ten guilty persons escape than one innocent suffer." Sadly, in the rush to punish the guilty, this underpinning of our system of criminal justice has been replaced by the adage, "You've got to crack a few eggs to make an omelet." The problem is human lives are at stake, not just the reproductive cells of domesticated fowl. But America has no monopoly on injustice. The recent box-office blockbuster, *In the Name of the Father*, chronicles the wrongful conviction, based on confessions obtained by torture, of alleged IRA guerrillas in England. The February 1, 1989, issue of *The Daily Yomiruri* featured the story of Masao Akabori, acquitted on retrial after 35 years in prison in Japan, 31 on deathrow, because he was innocent.

The difference between other countries and the United States is that the men in the cases cited above would be dead had they been convicted here. In *Herrera*, the Court opined that the proper avenue for claims of actual innocence was the state governor's office, where the wrongfully convicted could apply for clemency. Politicians are primarily interested in getting elected, increasing their power, and getting reelected. They would be reluctant to release a convicted felon from prison, and thereby repudiate the judge, prosecutor, and police regardless of any miscarriage of justice. A grant of clemency might be portrayed as "soft on crime." State and federal courts may prove just as futile to innocent people seeking their freedom.

Over the past ten years, the U.S. Supreme Court has erected a labyrinth of procedural barriers which severely restrict when, and on what grounds, people in prison may challenge their convictions by *habeas corpus*. In domino fashion, state courts and Legislatures quickly adopted the federal limits on post-conviction review in favor of "finality." Most of the same state lawmakers have established statutes shielding judges, prosecutors, police, and informants from lawsuits even where they've knowingly convicted an innocent person. In California, for ex-

ample, the wrongfully convicted are limited to a maximum compensation of \$10,000 no matter how many years they spent in prison, or how much suffering they've experienced.

Like all people tried and sentenced to prison, the wrongfully convicted are only entitled to one obligatory state appeal. Without funds to hire private counsel, they must rely on the court to either appoint the State Public Defender or a contract attorney. In California, former governor Ronald Reagan cut the successful Public Defender's Office in half, named a crony to head it, and forced out some of the most experienced criminal appellate defense attorneys in the bargain. Now, criminal appeals that cannot be handled by the Public Defender's Office are often handed out to the law firm which offers the lowest flat rate per case. It's not in the best interests of such firms to spend hundreds of hours and tens of thousands of dollars on investigators or forensic experts to uncover evidence of innocence.

If the state appeal is denied, the innocent man or woman must present their claim by petition for writ of *habeas corpus*. Absent certain narrow exceptions, only one petition challenging the underlying conviction can be filed. There's no right to the appointment of counsel, or the effective assistance of counsel, on *habeas corpus*. If the wrongfully convicted person hires an incompetent attorney, pays a bogus "jailhouse lawyer," or submits a poorly prepared petition on their own, that's it. They will stand legally convicted despite actual innocence. Although there are state and federal groups supporting crime victims, advocating longer sentences and harsher prison conditions, there are no real organizations dedicated to helping innocent people win their freedom.

Unfortunately, some level of crime will probably always be present in a "free" society. Law-abiding citizens have a right to be reasonably safe. But, does the right to public safety justify the routine conviction of innocent people, and denial of adequate means to fully investigate and litigate their claims? Apparently, many people think so. In a 1991 *Los Angeles Times* poll, a majority responded that the occasional execution of an innocent person wouldn't bother them.

Clarence Darrow, the famed attorney, said, "As long as the world shall last there will be wrongs, and if no man objected, and no man rebelled, those wrongs will last forever." Clarence Darrow is dead, and it seems the wrongfully convicted will remain forgotten.

New York Police Falsify Evidence

by Dale Gardner

Like any organized criminal enterprise, the New York State Police relied on the code of silence to protect them from exposure. The silence was broken in 1991 when a former state trooper, David Harding, applied for a job with the CIA. Harding apparently wanted to impress his prospective employers with his "covert operation" skills. During the course of a polygraph exam, Harding boasted that he had faked fingerprint evidence in several hundred criminal investigations. He also admitted to stealing large sums of cash from drug raids, and falsifying the weight of confiscated cocaine (to upgrade the offense to a more serious crime).

The CIA decided Mr. Harding's skills were not required, that for whatever reasons, he would not make a good operative. It took 15 months for them to relay Harding's incredible disclosures to New York State Police headquarters in Albany. That's when the plot began to unravel.

The Governor of New York appointed a special prosecutor to investigate the allegations. Harding was investigated, charged, and pleaded guilty to perjury committed in four separate trials. One of the cases involved a vicious assault on an elderly man. A suspect in the assault was informed that police (Harding) had lifted his fingerprint from the victim's sink. Faced with that highly incriminating evidence, the suspect confessed to the crime. At trial, Harding testified that he had lifted the incriminating print from the victim's sink. The FBI crime lab determined that to be a false assertion. Harding then admitted that he had lifted the print from a beer bottle found in the suspect's home.

In another case, Harding was asked to go undercover in order to obtain exemplars of prints from a murder suspect. Harding announced that he had obtained the prints and matched them to the crime

scene. A SWAT team was then dispatched to arrest the suspect. In the course of the operation, the suspect was shot dead. One year later another man confessed to the crime, giving police intimate details of the crime scene that could only have been known by the murderer.

The investigation widened when Harding's partner, Robert Lishansky, admitted to manufacturing fingerprint evidence in 321 separate cases—300 of which he worked alone. The other 21 cases involved other troopers. Lieutenant Craig D. Harvey, of the state police, recently pleaded not guilty on a 116 count indictment charging falsification of evidence. Lt. Harvey had direct supervisory responsibility over officers Harding and Lishansky. The investigation continues.

In response to the scandal, the New York State Police are instituting "sweeping reforms" to insure that future evidence is not falsified, including a requirement that two troopers sign all crime scene reports. In light of the fact that many of the cases to date involve more than one officer, these reforms may not prevent the practice in the future.

Prisoners in New York State whose convictions hinged on physical (fingerprint) evidence may want to look into this issue further.

Fraudulent Police Chemist Flees Justice

A former West Virginia state police chemist, Fred Zain, 43, accused of rigging criminal evidence in two states is missing and being sought by Texas authorities. Texas state district Judge Mickey Pennington issued what is called a "capias warrant" in Texas, meaning any law enforcement agency that finds Zain should arrest him.

Zain, a crime lab serologist, tested evidence for the West Virginia state police crime lab from 1979 to 1989, and was chief of serology his last five years. That state's Supreme Court last year ruled he may have fabricated evidence in as many as 138 cases.

While testifying as an expert witness in dozens and dozens of West Virginia rape and murder cases, Zain reported the results of tests he never performed, co-workers testified. They complained to Zain's superiors as early as 1985, but nothing was done.

In 1989, Zain took his pro-prosecution reputation and a letter of recommendation from the West Virginia Governor and headed to Texas, where he was named head of serology at the Baxter County medical examiner's office in San Antonio. He kept his Texas job until last year, when allegations stemming from his work in West Virginia reached San Antonio officials. A medical examiner there asked a well known forensic expert to review Zain's cases. The expert picked 14 at random, and found something drastically wrong in all 14 of them! Texas authorities say they think he might have tainted more than 1,000 cases.

Zain's wrongdoing came to light in 1992. An investigation was triggered by the case of Huntington, W.Va. resident Glen Dale Woodall, whose 1987 rape convictions were overturned after DNA tests showed he could not have committed the crimes. After serving five years for crimes he did not commit, the state awarded him \$1 million for his false incarceration.

Source: Seattle Times, July 28, 1994

MS Prison Officials Indicted

On June 14, 1994, US Attorney Alfred Moreton III made public a grand jury indictment of six current and five former Mississippi state prison officials in the 1991 beating of Larry Floyd, a prisoner at the Mississippi State Penitentiary (MSP) at Parchman. The five former employees have already admitted guilt and pleaded guilty to either participating in the beating or trying to cover it up. The other six officials, including Steven Puckett, now the Deputy State Corrections Commissioner, are charged with violating Floyd's civil rights. Floyd, a convicted murderer, was beaten after escaping from the Parchman prison. He was found the next day in an abandoned house near the prison. Court documents allege that Floyd, who was not resisting prison officials, was kicked and hit with a walkie talkie and handgun. Puckett was present at the scene, witnessed the assault and failed to stop it. At the time, Puckett was the MSP superintendent. If convicted Puckett faces 10 years in prison and a maximum fine of \$250,000. Presumably Mr. Puckett will now be reflecting on his ideas of penal reform.

Prisoners Have Right to Prompt Sentence Computation

David Plumb is an Oregon state prisoner. He filed suit under § 1983 claiming that his right to due process under the fourteenth amendment and his right to be free from cruel and unusual punishment under the eighth amendment were violated by state and county officials. He claimed that they delayed his receiving Credit for Time Served (CTS) in a county jail which resulted in his being wrongfully imprisoned for 83 days after the date on which he should have been released. The court rejected the Magistrate Judge's report and recommendation granting the state and county's motion for summary judgement when it ruled that the county was not entitled to qualified immunity and that Plumb's eighth and fourteenth amendment rights were indeed violated.

Plumb had spent 83 days in county jail prior to being sent to the Oregon DOC to serve his 12 month sentence. He asked state authorities to credit him with his 83 days CTS. They said that they would credit him with any CTS he could get the county officials to certify. Plumb wrote the county officials several times in order to certify his jail time and return it to his captors, the Oregon DOC. The county delayed responding until his sentence expired and he was released.

The district court relied on the law of the circuit established in *Alexander v. Perrill*, 916 F.2d 1392 (9th Cir. 1990) to determine that the county was liable under 42 U.S.C. § 1983 for violating Plumb's constitutional rights. The court held that Oregon state law creates a liberty interest in prisoners being correctly credited with their jail time and in having accurate release dates. The court held that if the county defendants had correctly performed their duties then Plumb would have been released when he was supposed to. By not performing their duties a jury could conclude that the county defendants had wrongfully deprived him of his good time credits. When a prisoner has an absolute right to good time credits, a state defendant cannot deprive the prisoner of those credits merely by failing to perform their duties. Plumb also had a legal right to have the Oregon parole board consider his CTS. The court gives

an extensive discussion of Oregon good time and parole board rules which are fact specific to Oregon. Because of this the court held that the county and the ODOC defendants had violated Plumb's due process rights.

The case law in the ninth circuit is that holding a prisoner past his release date constitutes cruel and unusual punishment in violation of the eighth amendment. Prison officials who refuse to release prisoners because they honestly, but erroneously, believe they have no right to be released can be found liable under the eighth amendment. "To find liability, the inmate must show that the official was aware of his complaint, but failed to aggressively investigate it, thus satisfying the deliberate indifference standard. The inmate is not required to show it was clearly established that he was entitled to be released. Rather, he need only have been clearly entitled to an investigation of his complaints... Whether the inmate was entitled to be released goes to the issue of causation of the injury, and is not at issue on qualified immunity." The court held there was sufficient relation between the acts and omissions complained of that a jury could well find the county defendants liable.

The court granted the state defendants qualified immunity because the major bungling leading to the violation of Plumb's rights was done by the county defendants. The court held that Oregon prisoners do have a clearly established right to be released on their correctly computed release dates. The court denied qualified immunity to the county officials and also allowed Plumb's state law negligence claims to proceed. See: *Plumb v. Prinslow*, 847 F. Supp 1509 (D OR 1994).

Court Returns Fines

In 1976, prisoners of the Allegheny County Jail in Pennsylvania filed suit against their keepers over unconstitutional jail conditions. Over the next 18 years of litigation, the court imposed \$2,729,300 in fines against county officials who refused to abide by court orders to alleviate overcrowding and improve conditions at the jail. In an order issued March 30, 1994, District Court judge Cohill ordered the court clerk, on his own motion, to return the fines to the county to be used for the exclusive purpose of jail

construction and drug rehabilitation programs.

In his order Judge Cohill notes that the jail population has soared from 429 when the litigation was filed to 1,270 in 1994 with a continuous overflow of poor defendants unable to make bail. The court commends jail officials for owning up to their constitutional obligations of providing a jail that comports with the federal constitution.

"Critics have accused the court of 'coddling' prisoners. I need only remember the stench which assailed the nostrils when I entered the jail for the first time in 1976, or recall the sight of human beings strapped down on canvas cots, their wrists and ankles held tight by leather thongs, to take comfort in believing that regardless of what the critics said, what I ordered was the right thing to do. I have appreciated the general support of the editorial boards of the major local news media through this laborious process."

A new jail is under construction which will hold 2,400 prisoners. Presumably this will alleviate the crisis which caused the court to impose the fines to begin with but if experience in other states is any indicator that too will soon be overcrowded. See: *Inmates of the Allegheny County Jail v. Wecht*, 848 F. Supp 52 (WD PA 1994).

No Immunity For Delay of Medical Care

Willie Harris was a pretrial detainee in the Coweta County, Georgia, jail. When he was arrested his hand was injured by tight handcuffs. Upon arrival at the jail, on September 6, 1990, he requested treatment for the injury. He was seen by the jail nurse on September 28 and later by the doctor who recommended a nerve conduction study. In November Harris requested medical attention for his hand which was now curled up and unusable. Upon being taken to the local hospital emergency room, the treating doctor called the sheriff's office and told them Harris required treatment and surgery. Unable to make bond Harris remained in jail and received no treatment or surgery. On March 11, 1991, he received the needed surgery, after he had been transferred to the state prison system.

Harris filed suit under § 1983 claiming that the delay of necessary medical care by the sheriff violated his eighth amendment rights by showing deliberate indifference to his medical needs. The jail defendants sought summary judgement on grounds of qualified immunity for their actions which the district court denied. The defendants filed an interlocutory appeal which the court of appeals for the eleventh circuit denied.

The appeals court held that prisoners and pretrial detainees have a well established right to prompt medical treatment. The issue in this case was whether the sheriff had violated that right. Because there were factual issues in dispute the court held that summary judgement was not proper. A trial was necessary to determine when the sheriff knew Harris needed medical help and what he did upon learning of Harris' medical problems. If Harris' allegations are true then the sheriff is not entitled to qualified immunity. See: *Harris v. Coweta County*, 5 F.3d 507 (11th Cir. 1993). [PLN, Feb. 1994]

On May 23, 1994, the appeals court reheard the case and withdrew the above opinion and substituted a new ruling which again affirmed the denial of qualified immunity for the defendants. The court gave a lengthier discussion of cases which have held jail and prison officials liable showing deliberate indifference to prisoner's medical needs where required treatment is delayed but not entirely withheld. "The tolerable length of delay in providing medical attention depends on the nature of the medical need and the reason for the delay. A few hours' delay in receiving medical care for emergency needs such as broken bones and bleeding cuts may constitute deliberate indifference... Delayed treatment for injuries that are of a lesser degree of immediacy than broken bones and bleeding cuts, but that are obvious serious medical needs, may also give rise to constitutional claims.... For these kinds of serious injuries, such as Harris', the law was clearly established that several weeks was too long to fail to properly respond to the medical need... The law was also clearly established that the right to medical care may include diagnostic tests known to be necessary, not just medicinal and surgical care."

The appeals court noted that a ruling denying the defendants qualified immunity does not render them liable for showing deliberate indifference to prisoner's medical needs. It only means that the

claims against the defendants may proceed to trial so that the facts may be more properly developed and a jury will make the determination of whether the defendants did or did not show deliberate indifference to the prisoner's medical needs. "...the subjective component deliberate indifference-whether the Sheriff had a sufficiently culpable state of mind so that his alleged wrongdoing amounted to punishment-is a question for the finder of fact that is not resolved through the objective reasonableness inquiry of qualified immunity" See: *Harris v. Coweta County*, 21 F.3d 388 (11th Cir. 1994). Readers should note that this ruling supersedes the earlier opinion, which should not be cited in legal pleadings.

Federal Public Defenders Govt. Employees for FTCA

Joseph Sullivan is a federal prisoner who filed suit against the two federal public defenders who represented him in a parole revocation proceeding. Sullivan initially filed suit in federal court under the court's diversity jurisdiction. In a previous decision the seventh circuit had remanded this case back to the district court for a determination of whether or not the Westfall Act, which amended the Federal Tort Claims Act (FTCA) at 28 U.S.C. § 1346(b), applies to federal public defenders (FPDs) sued by clients. See: *Sullivan v. Freeman*, 944 F.2d 334 (7th Cir. 1991).

The district court held that public defenders are government agents under the Westfall act and for FTCA purposes. The district court dismissed the individual defendants and substituted the US government as a defendant. The lower court then dismissed the action without prejudice so that Sullivan could pursue his administrative remedies with the appropriate federal agency. Sullivan appealed, challenging the application of the Westfall act to his claim. The court of appeals for the seventh circuit affirmed.

In a case of first impression, this is the first court ruling to hold that federal public defenders are government employees subject to the FTCA and the Westfall Act. The court gave a detailed explanation of the functions and appointments of the FPDs which led it to conclude that FPDs are officers or employees of the judiciary

for FTCA purposes. The court considered numerous cases which allow suits against public defenders and concluded those could be distinguished from the one at bar because those involved employees of the county or state, not the federal government.

The appeals court held that Sullivan had a cause of action grounded in state law to pursue his legal malpractice claim against the two FPDs. The only effect of the Westfall act is to supplement the protections provided to them under 18 U.S.C. § 3006A(g)(3), which authorizes indemnification and/or purchase of liability insurance for FPDs. "A federal public defender appointed pursuant to 18 U.S.C. § 3006A(g)(2)(A) is an 'employee of the government' for purposes of 28 U.S.C. § 2671 & 2679(b)(1). Sullivan's exclusive remedy for the defendants' alleged malpractice is thus an action against the United States under the FTCA. The district court proceeded appropriately under the Westfall Act amendments to the FTCA when it substituted the United States as the party defendant in accordance with 28 U.S.C. § 2679(d)(1) and dismissed Sullivan's suit without prejudice for his failure to exhaust administrative remedies." See: *Sullivan v. United States*, 21 F.3d 198 (7th Cir. 1994).

Ad-Seg Placement Without Hearing Illegal

Huey Wright is a New York state prisoner. In 1983 Wright was attacked in his cell by two other prisoners and placed in segregation on disciplinary charges. Three days later the disciplinary charges were dismissed by a hearing officer but Wright was retained in the Special Housing Unit (SHU) for an additional 67 days without any type of hearing. Wright filed a writ of habeas corpus in state court claiming he was illegally detained in SHU. He was released from SHU and a stipulated order was entered expunging all mention of the incident from his files. Wright then filed suit for money damages in federal court claiming that the 67 days he spent in SHU without a hearing violated his right to due process under the fourteenth amendment. The district court dismissed the suit with prejudice. The court of appeals for the second circuit affirmed in part, reversed in part and remanded.

Ad-Seg (cont.)

The appeals court noted that in *Matiyn v. Henderson*, 841 F.2d 31 (2nd Cir. 1988) it held that New York state regulations governing prisoners' placement in administrative segregation (ad seg) created a due process liberty interest in remaining free of ad seg placement. In *Matiyn* the court granted prison officials qualified immunity for events occurring in 1985, because of that the officials in this case, which arose in 1983, were entitled to qualified immunity with respect to Wright's claims that he was unconstitutionally placed into SHU.

The appeals court held that being confined in the SHU for 67 days without any type of hearing violates due process. "...what New York has done,... is to recognize that at some point a prisoner confined in administrative segregation must have his status examined by the prison authorities and be accorded some sort of hearing as to the grounds for his continued confinement. Wherever that point might be placed as a purely constitutional requirement in the absence of state law requirements, there can be no doubt that when state law mandates such a hearing no later than 14 days after admission to the SHU and a prisoners' confinement continues without a hearing for 67 days, a protected liberty interest has been impaired." The court denied prison officials qualified immunity because their own rules mandated the hearing within 14 days of SHU placement. While the rules may or may not suffice to overcome a qualified immunity defense for a modest period of confinement without a hearing "it surely leaves prison officials in no doubt that they have acted unconstitutionally where confinement has continued, without a hearing, for 67 days."

The district court had dismissed both the prison warden and DOC commissioner as defendants, claiming that Wright had failed to show any personal involvement by them in the deprivation of his constitutional rights. The appeals court affirmed the dismissal of the DOC commissioner because no evidence was shown that he was aware of Wright's prolonged SHU confinement. However, the court held that the warden was put on notice as to Wright's unlawful confinement when he was served with the state court petition for release from SHU. The appellate court thus concluded that the

warden was liable because he was a supervisory official who "after learning of the violation through a report or appeal, ... failed to remedy the wrong" and cannot escape liability by denying personal involvement. The appeals court affirmed dismissal of the DOC commissioner but reversed and remanded the rest of the case for further proceedings. See: *Wright v. Smith*, 21 F.3d 496 (2nd Cir. 1994).

Correct Jury Instructions Needed for Beating Trial

Keith Howard is a Missouri state prisoner. Upon returning to the prison after an outside medical visit, Howard was ordered to strip for a search. He refused and was thrown to the floor by several guards, 'hand-cuffed, forcibly stripped and taken to his cell. In this process Howard's head collided with a sink and toilet, his hair and handcuffs were pulled, and Terry Barnett, a guard, banged Howard's head against the wall outside his cell several times and once more upon putting Howard into the cell. Howard was then left naked and spread eagle in four point restraints on his bed, bruised, bleeding and with a chipped tooth. A prison nurse came to examine Howard but, out of embarrassment, he asked her to leave.

Howard filed suit claiming that this treatment violated his right to be free from cruel and unusual punishment under the eighth amendment. After a jury trial, the court entered a verdict in Howard's favor where they jury found Barnett liable for the injuries and awarded Howard \$1 in nominal damages and \$750 in punitive damages. The court awarded him \$21,254.68 worth of attorney fees. Barnett appealed and the court of appeals for the eighth circuit reversed and remanded.

The appeals court began by noting that the applicable standard in prison brutality cases involving excessive force in non-emergency situations was set forth in *McMillian v. Hudson*, 112 S. Ct. 995 (1992). The core judicial inquiry is whether force has been applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Relevant factors in making this determination include the threat rea-

sonably perceived by prison officials, the need for the use of force, efforts made to minimize the force used, the relationship between the need for using force and the amount of force used, and the degree of injury inflicted. See: *Whitley v. Albers*, 475 US 312, 106 S.Ct. 1078 (1986). The eighth circuit had previously discussed the jury instructions appropriate for prisoner eighth amendment suits in *Cummings v. Malone*, 995 F.2d 817 (8th Cir. 1993).

The court reversed the jury verdict in this case holding that the jury instructions merely told the jury to consider malicious behavior by guards as a factor to consider, rather than their pivotal inquiry. "In all cases where a prisoner alleges an Eighth Amendment violation based an excessive force, the fact finder may not conclude that the Eighth Amendment was violated unless it finds that the force was applied 'maliciously and sadistically for the very purpose of causing harm'; conversely, if the force does not meet this standard, such as where it was applied 'in a good faith effort to maintain or restore discipline,' the fact finder must conclude that the Eighth Amendment was not violated.... Because the jury was instructed improperly, and because we cannot conclude that the error was harmless, we must reverse the judgement entered on the jury verdict and remand this case for a new trial."

On remand the jury may properly consider an award of nominal damages if it finds that Howard suffered injuries of no monetary value or that are insufficient to justify with reasonable certainty a more substantial measure of damages. See: *Howard v. Barnett*, 21 F.3d 868 (8th Cir. 1994).

No Right to HIV Testing

In 1989 a Kentucky state prisoner, John Doe, requested testing for the HIV virus which causes AIDS. His request was denied because he did not meet the criteria for HIV testing established by Kentucky Corrections Cabinet Policy 13.5. That policy states: "Testing for the Presence of HIV antibodies. No routine testing will be undertaken. The physician may order the test for an individual under the following circumstances: a. The inmate presents clinical symptoms. b. The inmate provides a presumptive history of

exposure. c. A pregnant inmate reporting a history of intravenous drug use, prostitution or sexual activity with an intravenous drug user."

In 1991 Doe was transferred to another Kentucky state prison and he again requested testing, this time stating he may have been exposed to the virus while having sex with prostitutes. Testing was done and it showed he was HIV positive. Further medical tests showed the condition was advanced and his immune system had seriously deteriorated by the time his infection was discovered. He was released from prison later that year. Doe filed suit claiming that the denial of HIV testing on request and Policy 13.5 violated his rights under the eighth amendment. The district court dismissed the case and the court of appeals for the sixth circuit affirmed.

The appeals court held that policy 13.5, as written and implemented is constitutional. The policy allows testing of prisoners who can show a presumptive history of exposure, when Doe showed that history (which he claimed was a fabrication) he was tested. While the court did not reject the argument that prison officials must act on the likelihood that a prisoner is ill, just as they must act on the likelihood that a prisoner is suicidal or may be assaulted, it held that in this case officials were not deliberately indifferent to a strong likelihood that Doe was infected.

The court rejected Doe's argument that implementation and enforcement of Policy 13.5 had reduced his life expectancy because it caused his HIV infection to remain undetected, and untreated, in the interval between when he first requested testing and when he was actually tested. Thus, he argued, prison officials knew or should have known of the inevitable danger to health and life that their policy posed. The appeals court ruled that the constitution is not implicated. "...defendants did not deliberately decide to reduce Doe's life expectancy, because, though their actions were intentional, they did not know that their actions would have that effect... Defendants therefore, did not 'deprive' Doe of life within the meaning of the Due Process Clause of the Fourteenth Amendment. Doe's substantive due process argument is without merit." [Editor's Note: After all, who could possibly foresee that refusing medical diagnosis might result in a delay in detection and treatment.]

The court also held that Policy 13.5 does not violate equal protection by creating "classes" of prisoners for HIV testing purposes. "We think it plain that the actual text of the Constitution does not guarantee a right to on-demand HIV testing." Because of this, the policy only needs to "rationally further" a legitimate state purpose in order to survive the equal protection challenge. "This test involves only minimal scrutiny of the Policy's classifications, if 'there are plausible reasons' for the distinctions it draws, our inquiry is at an end." "Since the Policy arguably ensures that scarce medical resources are used in an efficient manner, it satisfies this test. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the decision to implement the policy. Doe's equal protection argument therefore is without merit."

Also dismissed was Doe's claim that his HIV status was improperly disclosed by prison officials to other prison employees. See: *Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994).

MO Court's HIV Disclosure Rule Struck Down

Judges in Cole County, Missouri enacted a local court rule requiring that jail officials inform them, in camera, whether a prisoner scheduled for a court appearance had an infectious disease or carried the HIV virus believed to cause AIDS. The purported reason for the rule was an effort by the trial judges to protect the public and court personnel from contagious diseases in general and HIV/AIDS in particular. The judges told prosecutors they would deny writs ordering defendants' presence in court unless jail officials provided the requested medical information. Prosecutors objected and appealed. The court of appeals for the Western District of Missouri invalidated the rule, holding it to be unconstitutional.

The state appeals court ruled that forcing the disclosure of prisoners' HIV status violated their right of privacy. Conditioning the prisoners' courtroom attendance upon disclosure of their HIV status also violated their right of access to the courts. Because there was no hint that past or present criminal activity in the courtroom presented any danger of HIV trans-

mission the rule was an unreasonable burden on prisoners. Furthermore, prisoner medical records are entitled to privacy, especially with regards to AIDS/HIV "For the government or a prison system or, in this case, a court to acquire such information, it must show a compelling interest, and the government must safeguard the confidentiality of such information." The appeals court entered an order forbidding enforcement of the HIV status disclosure rule. See: *State (Missouri) ex rel. Callahan v. Kinder*, Mo Ct.App, WDist, No. WD 48991, 5/24/94. 55 CrL 1270, 6-22-94.

Name Change Statute Upheld

Kevin Mathews is a Texas state prisoner who filed suit under § 1983 challenging the constitutionality of § 32.22 of the Texas Family Code. The statute in question prohibits convicted felons from changing their names unless the person has been discharged from parole or probation, has been pardoned or two years have passed since parole or probation were completed. Mathews is a Muslim and sought to change his name to a Muslim name. The district court dismissed the suit for failing to state a claim and the court of appeals for the fifth circuit affirmed.

Mathews relied on *Felix v. Rolan*, 833 F.2d 517 (5th Cir. 1987) which held that adoption of Islamic names by prisoners was protected by the first amendment and should not be unduly burdened by prison officials. The fifth circuit in this case held that *O'Lone v. Estate of Shabazz*, 107 S.Ct. 2400 (1987) required that they uphold the statute because Mathews still had other ways of practicing his religion and changing his name implicated prison security. In *Felix* the court had held that requiring a prisoner to use both his original and his religious name satisfied any security concerns by prison officials.

Not addressed by the court, nor apparently raised by Mathews, is the fact that Congress has expressly overruled *O'Lone* with the passage of the Religious Freedom Restoration Act (RFRA) [See: *PLN*, Vol. 5, No. 6]. It is doubtful whether the statute would pass muster under the RFRA. See: *Mathews v. Morales*, 23 F.3d 118 (5th Cir. 1994).

FL Prisoners Have Right to Attend Forfeiture Trial

A Florida state prisoner whose property was the subject of a forfeiture proceeding while he was imprisoned had a right under the due process clause of the Florida Constitution to be present at the trial, the Florida Court of Appeals for the Fourth District ruled on May 25, 1994.

Referring to the principles on forfeiture trials laid down in *Department of Law Enforcement v. Real Property*, 588 So.2d 958 (Fla S.Ct. 1991), the court deemed it "beyond any serious argument that appellant, whether he was incarcerated in a governmental institution or not, had a due process right to be heard at every stage of the forfeiture proceeding. In this particular case, that right was especially important because his right to forfeiture turned on his own testimony as to the occurrence that gave rise to his alleged participation in the criminal conduct with the property involved." The trial court should have either continued the case until the claimant was released or compelled his presence. See: *Preston v. Fort Pierce, Fla.*, Case No. 931810, Fla Ct. App, 4th District. 55 CrL 1298, June 29, 1994.

New Trial Required for Improper Testimony

Michael Kemp is a Missouri state prisoner. He filed suit under § 1983 claiming that a prison guard, Antonio Balboa, had confiscated his epilepsy medication and flushed it down the toilet. This resulted in Kemp having epileptic seizures during which he injured himself. The case went to trial and a jury awarded Kemp \$1.00 in nominal damages and \$1.00 in punitive damages. The district court awarded Kemp \$32,181.40 in attorney fees and costs. Both parties appealed the verdict and fee awards and the court of appeals for the eighth circuit reversed the verdict for a new trial solely on the issue of damages.

During the trial the lower court allowed a prison nurse to testify that, according to prison records, Kemp had failed to pick up his epilepsy medication

on several occasions. Kemp's attorney objected because the nurse had no personal knowledge of this because she did not work on the days in question but had instead, read Kemp's medical records.

The appeals court held that the nurse was obviously not an expert witness and that Federal Rules of Evidence 603 do not allow a witness to testify about matters of which they have no personal knowledge. Thus, the lower court erred in allowing the testimony. The court reversed for a new trial because the jury could have concluded, from the nurse's improperly admitted testimony, that Kemp's injuries were at least in part due to a failure on his part to take his medication as well as Balboa's unlawful confiscation of the medication. The medical records in question were not entered into evidence. The court held the error was not harmless because without it the jury may well have awarded Kemp actual damages to compensate him for his injuries.

A new trial on the issue of damages alone was appropriate because Balboa's liability was not in dispute, only the amount of damages Kemp was entitled to remained to be decided. Because of the ruling vacating the damages award the court also vacated the award of attorney fees so that the lower court could reconsider its award after the trial on the issue of damages. See: *Kemp v. Balboa*, 23 F.3d 211 (8th Cir. 1994).

Agreement Reached in State-wide Pennsylvania Prison Case

On Aug. 12, 1994, lawyers representing the prisoners announced that they have reached a settlement with the State of Pennsylvania in *Austin v. Lehman*, the state-wide prison conditions case filed in November, 1990. The agreement has been presented to U.S. District Judge Jan DuBois for approval.

In 1990, the Pennsylvania prison system was on the verge of collapse. An increase in the prison population of almost 400% over twenty years had caused massive overcrowding, overburdened medical services, increased violence and simply overwhelmed the resources of the Department of Corrections. Overcrowding led to increased tension in the prisons

and, as a result of either riots or threats of riots, the DOC had been forced to put one after another of its institutions on lockdown. The worst of the riots took place in October 1989 at S.C.I.-Camp Hill where 2,600 inmates were housed in a prison built for 1,800.

As a direct response to these events, the National Prison Project of the American Civil Liberties Union together with the ACLU of Pennsylvania, the law office of Kairys & Rudovsky, the Pennsylvania Institutional Law Project and the Disabilities Law Project filed suit against the state. The complaint alleged that conditions of confinement in the state's prisons were unconstitutional. Only two prisons were excluded from the suit as they were already the subject of other court orders.

Trial began in December, 1993, following extensive discovery and tours of the institutions by medical, environmental and security experts. Five weeks into the trial, the parties, with the encouragement of the court, entered into settlement negotiations. The agreement they reached is a wide-ranging one covering corrections, environmental and fire safety, medical and mental health care issues. Some of the key provisions provide for:

- a strict policy for investigation of prisoner complaints of excessive force by guards
- increased law library access and legal assistance
- job and educational opportunities for all prisoners
- a formula for establishing a minimum number of doctors, nurses and dentists at each facility which will require an additional 150 health care positions
- a number of new health care policies similar in scope and level of detail to the tuberculosis policy implemented under a preliminary injunction obtained in 1992
- a Chief of Psychiatric Services to oversee all aspects of mental health policies and practice system wide
- a minimum of 800 special needs unit beds and 212 mental health unit beds
- numerous changes to the environmental (food service, sanitation, ventilation, etc.) and fire safety conditions, all to be subject to independent inspection.

While the 87-page settlement agreement is not a Consent Decree and cannot be enforced directly in court, it does allow the lawyers for the plaintiffs to re-institute the lawsuit any time within the next three years if the defendants do not abide by the terms of the agreement. NPP attorney Elizabeth Alexander says, "The Department should be commended for entering into this agreement. Not only does it make continued expensive litigation unnecessary, but more importantly it will bring immediate improvements to the conditions under which the men and women in Pennsylvania's prisons must live."

Seg Prisoner Entitled to Competent Hearing Help

Kenney Nix is a South Carolina prisoner. He was charged with violations of prison rules, placed in administrative segregation and found guilty of the charges at a disciplinary hearing. Prior to the hearing, Nix was assigned a staff member to assist him in gathering witness statements. The staff member claims he was unable to locate the requested prisoner witnesses in the prison. At the hearing Nix requested the presence of two prisoner witnesses whose testimony would exonerate him of the alleged misconduct. The hearing officer denied the request stating such requests had to be made prior to the hearing, in writing. The staff advisor claimed he was not aware of such a rule. Nix filed suit under § 1983 claiming that the denial of witnesses at the disciplinary hearing violated his right to due process. The state argued that he did not have such a right and if he did, it was not clearly established and the defendants were thus entitled to qualified immunity.

While the Supreme Court, in *Wolff v. McDonnell*, 418 US 539, 94 S.Ct. 2963 (1974) held that prisoners are entitled to assistance, either from another prisoner or from a staff member, if they are illiterate or the issues are complex, only one court has thus far held that being in segregation is a circumstance requiring assistance. See: *Eng v. Coughlin*, 858 F.2d 889 (2nd Cir. 1988). Prisoners are entitled to call witnesses at disciplinary hearings.

Also, "...this court finds that it is clear that once a prisoner is placed in adminis-

trative segregation, he is then incapable of interviewing or obtaining statements from potential witnesses. Thus, this court concludes that at the time of plaintiff's hearing there was a clearly established constitutional right to sufficiently competent representation when a prisoner in administrative segregation is facing a disciplinary hearing." On this basis the court concluded the defendants were not entitled to qualified immunity from money damages for their actions. See: *Nix v. Evatt*, 850 F. Supp 455 (D SC 1994).

Pepper Spray Hazardous

The July 2, 1994, issue of the *Seattle Times* reported that troopers with the Florida Highway Patrol (FHP) will no longer be sprayed with pepper spray as part of their training. The change in policy came after patrol Lt. Harold Frear filed a complaint with the Florida state Labor Department. As part of the FHP's training, troopers were sprayed with the pepper spray to be familiar with its effects. When sprayed onto a person's face, the chemical burns the skin and causes temporary blindness. It takes between 10 to 15 minutes to recover from the spray, which contains a hot pepper extract and other chemicals.

Frear's lawyer said that the FHP doesn't know enough about the long term effects of the pepper spray and that troopers shouldn't be blasted with it. According to Labor Department officials who investigated Frear's complaint, the spray contains hazardous chemicals and at least four troopers sprayed with the chemical suffered injuries serious enough to require medical attention.

Readers will note that while troopers will no longer be sprayed, they will still have the chemical and be able to spray citizens. Chemical agents are routinely used against prisoners by prison officials. Prisoners exposed to such agents may want to consider researching the spray used and if it contains hazardous chemicals they may be able to present an eighth amendment claim for its use. The manufacturer would also be liable for marketing a hazardous product likely to be misused. *PLN* is interested in articles on litigation challenging the use of chemical agents in and out of prison.

Bias in Military Death Penalty

The Vol. 5, No. 6, issue of *PLN* reported on studies showing the new federal death penalty was racially biased. A recent report issued by the Death Penalty Information Center notes that of the six men (three soldiers, two marines and an airman) awaiting execution at the US Disciplinary Barracks in Ft. Leavenworth, Kansas, five are black. This falls into the historic pattern of military executions. Between the 1950 passage of the Uniform Code of Military Justice and 1961, when military executions halted, eight of the nine soldiers executed were black, one was white.

All of the current military prisoners awaiting execution have been convicted of killing whites, those convicted of killing black victims have received life sentences. The military has not executed, with judicial sanction, any of its members since 1961. That will likely change in the near future as several of the soldiers awaiting execution have almost exhausted their military appeals and their death warrants will be forwarded to president Clinton for signature. As Governor of Arkansas Clinton never granted a petition for clemency and presided over the murder of four prisoners, one of them, Ricky Rector (who was Black or mentally disabled), during his presidential campaign.

David Brahms, a retired white Brigadier General who had served as the Marine Corps highest defense lawyer, said that base commanders are usually white and most court martial juries are white. The result is greater punishment for black defendants convicted of murder in the military.

U.S. Number 1

The United Nations released its 1994 Human Development Report in mid June, 1994. According to the report, the United States is first in murders, first in military spending, first in rapes and first in road accidents in the industrialized world. It said that 20 children a day died from gunshot wounds in 1992, 14 million crimes were reported to police, more than 2 million workers were physically attacked and nearly 6.5 million others were threatened with violence. Consumer spending on illegal narcotics in the US is

US Number 1 (cont.)

thought to exceed the combined income of more than 80 developing countries, said the report. During the 1980s, real earnings of Americans fell by 3 percent and nearly 15 percent of the population now lives below the poverty line.

It is not known by *PLN* whether the UN report also mentioned that US is number 1 in another category: imprisonment of its citizens. For several years now the US has lead the world in its per capita imprisonment rate of 455 per 100,000 of its population. Indeed, the state of California has the second largest prison system in the world after China.

PR Prisoners Rebel

On July 10, 1994, more than 8,000 prisoners in 16 prisons across the US occupied island of Puerto Rico went on strike to protest overcrowding and bad living conditions. Puerto Rico's 34 prisons hold almost 11,000 prisoners. For the first ten days of the strike prisoners refused to do their chores or work until prison officials agreed to improve prison conditions and they had met with prisons administrator Otto Riefkohl.

On July 20, 1994, the strikers at the Rio Piedras Correctional Complex in San Juan, which holds 2,160 prisoners, took a more active stance by rioting twice in the same day. In the first incident, at about 6:45 AM, when prisoners refused to go to court hearings and medical appointments, some 1,200 prisoners set fire to four staircases and attacked guards with clubs and knives. Twelve guards and 59 prisoners were injured in this incident, according to prisons spokesperson Wanda Rivera. She claimed the rioting and fires were under control by 11 AM. The second protest began at 2:15 PM that day while the press conference about the first incident was in progress. Three prison guards were attacked by prisoners with clubs. Rivera claimed this was repressed in five minutes.

The Rios Piedras prisoners reiterated their request to meet with Riefkohl and he refused stating "first they must meet with the prison directors." Corrections Secretary Zoraida Buxo suspended visits to prisons a few days after the strike began claiming "security."

On July 21, 1994, prison strikers at the Ponce Correctional Complex mutinied by

setting their mattresses and belongings on fire. Eight prisoners were injured in the incident. Ponce prisoners had rioted two week before this but the details are not available to *PLN* at this time.

Rather than address the subhuman conditions and overcrowding to which Puerto Rican prisoners are subjected to Buxo told reporters "We're not going to yield to undue pressure." As we go to press *PLN* does not know what the outcome was of the strike and rebellions.

El Salvador Prison System in Crisis

On August 4, 1994, 300 prisoners at the San Miguel prison in El Salvador took a judge and his secretary hostage to protest prison conditions. The hostages were freed a few hours later after judicial officials signed an agreement to study the prisoners' demands for prison reforms. The demands include an end to prison transfers, permission to set up prisoner groups and government assistance for prisoners after their release. The judge was at the prison to investigate disturbances that on August 2, 1994, left one prisoner dead.

On August 19, 1994, hundreds of armed prisoners clashed with guards during an attempted mass escape from El Salvador's biggest prison "La Esperanza" (The Hope) which holds 2,300 prisoners near the capital of San Salvador. The prisoners were armed with rifles, pistols and grenades. By the next day police and soldiers had retaken most of the prison, leaving one guard dead and two wounded with nine prisoners dead and 15 wounded in the clashes. The escape attempt began when a group of women arrived at the prison for conjugal visits with the prisoners.

The prison at La Esperanza has been the site of numerous escape attempts. Since November, 1993, more than 40 prisoners have been killed in Salvadoran prisons. When social democratic guerrillas surrendered in 1992, ending the country's decade long civil war, thousands of soldiers and guerrillas were demobilized. Unable to find jobs or other employment many of the former combatants have turned to crime, leading to a skyrocketing crime rate. None of the country's economic inequalities which had, in part, caused the civil war were addressed leav-

ing poverty and employment a continuing problem but this time with a well armed population. As a result the Salvadoran prison system is massively overcrowded under harsh conditions of confinement. This has led to continuing rebellion and struggle by the prisoners.

German Court Legalizes Soft Drugs

On April 28, 1994, the Federal Constitutional Court, Germany's highest court, ruled that possession of small quantities of hashish and marijuana should no longer be the subject of criminal penalties. The ruling came as the court affirmed the 1992 lower court ruling by Lubeck judge Wolfgang Neskovic. The judge had ruled that all laws against marijuana and hashish were unconstitutional because they violated the German constitution's equal protection provisions. He said that the users of cannabis products deserved the same protection as the users of other intoxicants, such as alcohol and tobacco. Prosecutors appealed the decision.

Under the 7 to 1 high court ruling, laws against cannabis products remain on the books but police may no longer make arrests for its possession. The court held that possession of cannabis products "in small quantities and exclusively for personal use" would be legal. The ruling leaves it up to the states to decide what amount shall be "small." The government estimates that 8 million of Germany's 80 million citizens use marijuana and hashish regularly.

The new policy resulting from this court ruling will not be as tolerant as that of the Netherlands where marijuana and hash are openly sold in more than 1,000 coffee shops throughout the country. In Poland and Spain, cannabis possession is legal but it may not be freely sold. Belgium, Switzerland, Italy and England have laws against possession but rarely enforce them. As reported in the July, 1994, issue of *PLN*, the Colombian Supreme Court also recently ruled that the criminalization of marijuana possession was unconstitutional under that country's constitution. As the rest of the world calls a truce in the failed "war on drugs" the US continues its futile effort of draconian penalties and ever harsher punishments.

Source: The National Times, August, 1994.

The Fire Inside

by Ray Luc Levasseur

October, 1994, marked the eleventh year of collective punishment at the United States penitentiary, Marion. It marked a decade of lockdown, control unit regimes and government lies. No doubt the federal Bureau of Prisons will commemorate the event by rolling out its propaganda wagon, and indulging the public with some contrived fantasy about the lockdown's purpose and effectiveness. Silently, they'll rejoice at the well-orchestrated scam they've pulled off.

In a society that criminalizes poverty and makes racism a redeeming social value, the Bureau of Prisons simply plugs its propaganda arm into a mass media whose corporate ownership serves its own interests. There is significant political capital to be had by scapegoating the disenfranchised and deflecting the public's attention away from the real issues which affect their quality of life.

Marion is the most written about prison in the world. One of the battle lines drawn in October, 1983, was for public opinion. The government is winning this battle hands down. The Bureau of Prisons utilizes a highly effective public relations strategy which revolves around the agitprop slogan "the worst of the worst" to describe Marion prisoners. It is a soundbite which condenses "nigger, spic, white trash, jobless, homeless, useless underclass" into one dehumanizing phrase. Dehumanizing a population with language is a prelude to dehumanizing them with force.

The Bureau of Prison's statement is false, unless the "the worst" refers to rebels, dissenters, revolutionaries, jail-house lawyers, group members and others whose beliefs and integrity the Bureau of Prisons wants to crush. It is false when one examines who is sent to Marion, and why they're here. Certainly there are exceptions, but those exceptions don't warrant the use of collective punishment. Additionally, I've not met a convicted felon whose misdeeds were in any way comparable to the massive killing of civilians perpetrated by the likes of Nixon, Reagan, Bush, et. al. No one here has been convicted of crimes against humanity in the court of world opinion.

"The worst of the worst" has no meaning outside the realm of propaganda be-

cause any prisoner can be sent to Marion at any time, for any reason, without due process of law. In Bureau of Prisons parlance, dissent and rebellion are "management problems" to be suppressed. What it feeds the public is designed to secure support for such schemes.

Effective propaganda diverts people from thinking and acting not only on prison issues, but also on the problems that led to the construction of the American gulag: poverty, racism and injustice stemming from an unbridled capitalism that diminishes the humanity of its victims. Marion is but one more satellite in the ever-expanding concentric circles of oppression and violence that are consuming society. This is good news for prison and related bureaucracies. Instead of being hung out to dry, these parasitic purveyors of misery are relishing their careers, fattening their wallets and passing themselves off as guardians of the sliced white bread culture.

In a recent London *Sunday Times* article on Marion, a denizen of the local community was quoted as saying that Marion prisoners should be taken out and shot as part of the deficit reduction plan. This citizen comes from the same pool from which the Bureau of Prisons recruits its guards. Bleak economic realities feed such fascist sentiments. Marion's guards are the descendants of once proud coal miners and factory workers—many unionized. But when the mines and plants closed they were left floundering on their own. Their response is to board the nation and state's biggest growth industry—human chattel.

Illinois recently approved construction of another state control unit prison. Before the ink was dry on the legislation, the economically depressed counties of southern Illinois were unabashedly begging for the prison to be located on their turf. One state legislator stated there was so much unemployment in his county, "it would be a crime" not to locate the prison there. A crime not to build a control unit prison in an area already saturated with them. "Worst of the worst" means nothing to these people. All they want are warm bodies to feed on. They don't much care where they come from.

One of the most significant reverberations of the Marion lockdown is the subsequent proliferation of control unit pris-

ons throughout the country, thirty eight, according to a recent Human Rights Watch report, which also documents the inherent abuses. This proliferation is part and parcel of the rapid expansion of the entire prison system. Marion was the flagship, but no longer the exception.

Even a relatively small state like Maine has opened a control unit for 100 prisoners at an initial cost of \$16 million. Already the state is seeking to double the size of the prison. Maine's situation somewhat reflects what's happening nationwide. The state spent money it could not afford to build a control unit prison it doesn't need. Concurrently, the state cut rehab programs at the Youth Reformatory and slashed programs to Aid to Families with Dependent Children (\$418 a month for a parent with 2 children). By gouging the needs of children, the state insured a steady supply of youthful offenders to fill its control unit and other cells well into the next generation. New York and Florida have come up with their own creative fraud by diverting funds initially allocated for the homeless and social welfare programs, to fund prison construction and operations.

Propaganda that promotes control units as effective against crime—in and out of prison—perpetrates a cruel hoax on an unsuspecting and too often gullible public. Like most government bureaucracies, the Bureau of Prisons hides the cost overruns from a public who will foot the bill. In real terms, "more bang for the buck" is quickly eroding their false sense of security.

When men and women are locked in small cells 22-23 hours a day, with little human contact, in a violent environment devoid of respect for the human spirit, there is a steep cost not limited to prisoners or dollars. Certainly the prisoners suffer. And much of it not played out in violent prison incidents is internalized in an organic time capsule. Eventually, they carry the years of abuse and neglect right on through their release dates, which is when it's all brought home. A prisoner doesn't separate him/herself from the prison experience anymore than soldiers separate themselves from the wars they live through. Neither does the media, which puts its own spin on the term "ex-convict" to mean depraved and violent.

If prisoners never returned to their neighborhoods and communities—or anyone else's—the public might take some perverted comfort in never seeing them again. But this doesn't happen. Even the most extensive prison system in the world can't keep millions of people locked up forever. While some former prisoners salvage their lives and spare others—entirely through their own efforts—the majority proceed to engage in both self-destructive behavior and crime aimed at the lives and property of others. Life's agenda is reduced primarily to one more paycheck or payback.

Those who become victimized by the alumni of America's prisons need ask themselves the following: will the trillions spent on prison hardware and subsidizing the welfare payments of prisoners buy back the lost lives of those they thought they were protecting with their tax dollars? It won't. The funds that could have been invested in human services and community development were pissed away down bottomless sinkholes of violence, heartache and the illusion that repression will provide security.

The misnamed criminal justice system churns out an appalling casualty rate. There are now almost one million children under the age of 18 who have one or both parents in prison. One in four young black men is in prison or under police "supervision." More Latinos than ever before are locked up. More women and children. More of everyone whose lives are plagued by poverty and racism. The proliferation of control unit prisons represents one response of wealth and power to the agony of the oppressed.

Early in the lockdown, Marion prisoners put up a stiff resistance. Whether in this prison or elsewhere, the majority have been subjected to police assaults, beatings, gas, clubs, prolonged restraints, drugs, anal probes, stun guns, humiliations, degradations, harassment, psychological rape and mistreatment of all sorts.

The U.S. calls this "torture" when referring to other governments. It's not like we haven't been there. Little positive has come of it other than maintaining our personal integrity. Earlier in the lockdown we had important outside support. Now that most of this support has worn out, a cloud of pessimism, if not cynicism, descends over the entombed.

During the 11 year reign of the Marion lockdown, prisoners have attempted to

redress their grievances through the federal courts. They got nothing but a judge's spiteful decision that sordid and horrid conditions do not violate constitutional rights. The many prisoners who testified about beatings and other rights violations were dismissed as liars (courts tend to credit prisoners' testimony only when they testify for the government). Congressional subcommittee hearings did little besides enter Marion's devastation into the public record.

This isn't to say that judicial and legislative efforts should be abandoned. There is pending litigation by control unit prisoners in other districts that may produce different results. And various state legislatures may respond differently to their constituents' concerns. Yet given the prevailing political climate and the entrenchment of the Marion model, little is likely to come from this approach other than a belated civics lesson.

The Bureau of Prisons cannot continuously apply heat to Marion without allowing some steam to escape, unless they want the place to blow up. The Bureau of Prisons' efforts to contain organized resistance and picking off individual efforts is rooted primarily in the control unit regimen: isolation, separation, controlled movement in restraints, limited communication and the selective use of violence.

But there is more. The answer also lies in the Bureau of Prisons' arbitrary use of control mechanisms that begin with who is sent to Marion, and why they're singled out. The process continues more arbitrarily—in determining who leaves Marion, and when. Clear conduct (no disciplinary infractions) alone will not get a prisoner out of Marion. Some will leave in the minimum 2 1/2 years; some in 5 or 10; some appear branded not to leave at all. Some turnover is necessary because the 375 capacity must have room to warehouse new arrivals, including recidivists.

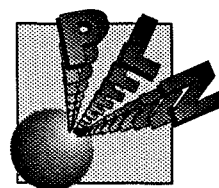
No one can fault a prisoner for wanting to be on that bus out of Marion. However, the emphasis on catching that bus in the 2 1/2 year minimum has evolved into the most viable method for the majority of prisoners to escape Marion's clutches. In turn, this has led to individual programming rather than a more collective effort to end the lockdown. The lack of outside support reinforces the view that each of us is on his own.

As the political resources for prisoners base waned, the federal government has continued to beef up its repressive capac-

ity. A new control unit prison is being built in Florence, CO, which will replace Marion in 1994. The addition of 200 cells over Marion's capacity underscores the failure of Marion's lockdown to reduce violence and rebellion in the federal prison system and states which tap into it. Florence's 550 permanently locked down cells await those who will continue to refuse and resist, as well as those caught up in the spiral of crime that prisons produce. Conditions at Florence promise to be considerably worse with more emphasis placed on deeper isolation.

It's not easy to chart a future course from inside. Doing time in these joints is like walking a mine field. The Florence prison will present new challenges and other control units are cutting their teeth. We know from Attica, Lucasville, and a hundred other rebellions, both organized and spontaneous, that stiff resistance will continue. Some of it will be violent. We also know that as captive slaves we are extremely vulnerable to offensive violence and retribution by the guards. For this reason, some matters are best left to clandestine maneuvers. What's clear to me now and has been since I first did time in '69-71 is that no matter how much litigation and legislation is filed and defiled the road to building a prisoners' movement is paved with solidarity. Irrespective of individual differences and group affiliations, we all have a common bond on which to stand together. Solidarity is our greatest weapon, bar none. Additionally, outside support is critical. A necessary lifeline involves family, friends, professionals, and political activists. We urgently need a stronger voice. And everyone—inside and out of prison walls—can help build it.

Ultimately, control units like Marion must be shut down. But in the meantime, attitudes with a political consciousness; adoption and application of the United Nations' Standard Minimum Rules for the treatment of Prisoners; outside observers—taken together, can open a new front in the struggle for justice.



Eleventh Anniversary of Marion Lockdown

by Tom Silverstein

I was asked to put together an article to tell my side of the story of how the cruel and unjustifiable lockdown at Marion kicked off eleven years ago. I am supposedly one of the two reasons (excuses) BOP officials gave to justify the lockdown. *PLN* is the only news media with enough walkin' around sense to ask those of us actually involved in the "inside" story to give an account of events.

I have had some dealings with magazine and book writers in the past who have twisted my words, put their own words into my mouth, taken prison officials' version of events and printed them as facts while ignoring what I said, all in the name of being "objective." When one writer failed to include the fact that a guard had threatened me, he said he thought his readers wouldn't believe it. This was before the Rodney King incident, so maybe now the red-blooded, brain-dead citizens living in the suburbs of fascist America would be more prepared to entertain the idea that cops and prison guards actually brutalize people just for the hell of it.

I don't want to waste all of this space, though, writing about the already known "demonic" nature of Marion itself, or reminding people of how the prisoners' side of things gets white-washed by the 6:00 o'clock news machine that rushes to the site of the prison strife and gets the "inside scoop" from some prison official and runs back to broadcast the "truth" to a blank-eyed, gullible American public. Instead, I will take full advantage of this opportunity to finally tell my side of the story in my own words.

In 1983, after three long years of torment from a sadistic Marion guard, and having my life put in danger, I finally couldn't hold my cool and I snapped - attacking him. He died later in the infirmary. Hours later during FBI and BOP interrogation, I told them the incident was "personal" between he and I, *not* a guard vs. con thing. I mean, I just didn't attack him 'cause I didn't have anything better to do that day (as they like to pretend whenever guards get repaid for what they do to people in here!). I would never move on anyone without *serious* provocation, especially a guard, since they have the biggest and most sadistic gang going

in the prison! The fact that I have been in solitary for the last eleven years (and everything else they have done to me) *shows* that they retaliate. So things have to be bad before a rational human being is moved to that point. As with 99% of prison uprisings, people just can't take any more so they move into action.

When the incident occurred, there were two other guards escorting me from the shower area to my cell. I was in the Marion control unit at the time. I could have assaulted those two guards if it were a guard vs. con thing, but I didn't. They fled when he and I got into it. So there was no involvement whatsoever with any other staff. Unfortunately, another guard was mortally wounded that same evening in another part of the control unit. It didn't surprise me since at that time, more so than ever, control unit prisoners were being grotesquely traumatized and brutalized after a new chain of command had just taken over. There's just so far people can be abused before they defend themselves!

A week after the killings, myself and the other prisoner charged with killing a guard were transferred out of Marion to two separate prisons, and have been held in specially designed security cells ever since. According to BOP's propaganda, the guards' deaths were due to "a couple of white supremacists." I can't speak for why the other prisoner did what he's accused of, but I know that at one time he was a practicing Muslim, so I doubt he considers himself a "white supremacist." Yet the press just automatically printed whatever BOP puppeteers said without bothering to ask us prisoners what happened and what motivated it. All that people heard about the incident is what the BOP wanted them to hear, nothing about what was really going on in the control unit that led up to the guards' deaths.

However, I said all this to say that BOP claims it was because of "us two" they had to lock the joint down permanently, a decision made long after we were gone. Plus, to show the absurdity of using us two as a justification for the Marion lockdown, the control unit we were in is for all practical purposes a separate prison from the mainline. It was separate in structure, location, and policies, etc. Con-

trol unit prisoners never came into contact with mainline cons. So whatever occurred in the control unit literally *had* nothing to do with the main population. This means the ploy used to keep Marion locked down since 1983 is false and fabricated to suit BOP's own agenda. It has since been revealed (in documentation) that the lockdown was a long awaited plan of theirs. They were just waiting for an excuse they could use to put their plan into action. Well, they got their excuse, and now they're using the "security concern" ploy to bury many more prisoners in other super-max lockdown hell holes across the country. Once they figured they could get away with it, and they were able to get the press and the "get tough" politicians to applaud the sadistic practice, they began to build more "Marions."

Prison officials are notorious for exaggerating facts, over reacting, and "labeling" people to whatever suits their purposes in order to vilify those they abuse, and to justify their own wrong doing. They do it to discredit our testimony and our actions, to divide us and to keep us at each others' throats. So I plead with those unaware of the provocateurs' ploy to be mindful when official commentary is given about this group or that group being involved in an incident. The BOP is not interested in offering the truth about the goings on behind the walls. They are more interested in trying to sabotage our struggles by suggesting that it was just a couple of radical whites going off. They want to attribute certain brands of ideology to prisoners according to race or association, so instead of the public asking why a fight or a prison rebellion occurred, they can automatically assume it was just a bunch of crazed, mad dog killers raising hell again for no reason or rhyme.

The BOP's propagandized 1983 press releases served multiple purposes. The bottom line is this: the death of the two guards had nothing whatsoever to do with a "white supremacist" agenda. I am sick of the authorities falsely attributing certain ideologies and criminal activities to individuals and groups of prisoners. By dividing and labeling us, prison officials can douse any spark of unity among us. They can use the stereotypes they help create to justify their own abuses to the

public. By characterizing us as crazed mad-dog killers they can get public sympathy when they bury us alive in the most inhumane super-max solitary lockdown hell holes.

We all need to wake up and realize who our real adversary is, since they are burying us alive deeper by the day, regardless of race or religion or home state. It doesn't matter who I am or where I am, since we're all on the "inside." We all live in this hell hole together, so it's the same old shit in just about every joint across this fascist, prison-happy nation. It's time for all of us inside and out to unite and stop falling into the numerous traps our keepers continue to set for us, and band together in solidarity for a common goal.

Amnesty Criticizes OK Control Unit

On June 14, 1994, Amnesty International (AI) released a report harshly criticizing the control unit at the Oklahoma State Penitentiary (OSP) at McAlester. An AI investigation team toured the prison's H. Unit in March, 1994, and found that some 350 prisoners are held 23 or 24 hours a day in underground, concrete, windowless cells which allow virtually no natural light or fresh air. Prisoners can only exercise during weekdays, five at a time, for one hour in a bare, enclosed, concrete yard that gives no view of the outside. "Prisoners are confined to a concrete world in which they never see a blade of grass, earth, trees or any other part of the natural world," said the report.

Since H unit opened in November, 1991, AI has received repeated complaints about its conditions, which the human rights group considers to be in breach of both US and international standards governing the treatment of prisoners. Some prisoners housed in the unit have developed severe depression since being in the unit, which was designed by a committee of prison staff. The report focused mainly on the 118 death row prisoners because they are housed in H unit indefinitely, either until the state murders them or the death sentences are overturned, without regard to their individual behavior.

The cells have no alarm bells and prisoners talk to guards via an intercom system controlled by staff. When the inter-

com is switched off it is very difficult for prisoners to attract attention. AI believes that this remoteness between staff and prisoners can breed a sense of indifference to prisoners' legitimate needs. Prisoners complain that guards repeatedly ignore requests for medical or other attention. Seriously mentally ill prisoners receive little or no psychiatric care.

AI was gravely concerned by the stress and danger caused by the prolonged confinement of two prisoners together in such enclosed cells. The isolation and lack of out of cell activities or any opportunity for work, education or recreation can have a detrimental effect on prisoners' physical and mental health according to AI.

The report contains a number of recommendations to prison officials to improve the unit: more out of cell time; better exercise facilities and access to fresh air; a review of medical and psychiatric services provided H unit prisoners and an opportunity for death row prisoners to have their custody status reviewed. Copies of the report are available from:

News in Brief

WA: In May, 1994, three former prisoners and two staff members of the Snohomish county jail filed suit in US District Court in Seattle claiming that they contracted tuberculosis at the jail due to its lax testing and screening policies. The plaintiffs' attorney, Ted Spearman, stated that people have told jail workers they had active, infectious TB and they were housed in the jail's general population. The jail lacks adequate ventilation and proper exposure to ultraviolet light which are considered preventive measures. **Brazil:** Four people died and 10 were wounded in a thirty hour prison riot in early July, 1994, at the Porto Alegre prison, according to government officials. A police inspector was among the dead and the warden was among the wounded. **Rumania:** In a bid to escape forced labor by being placed in hospitals, Rumanian prisoners have taken to hammering nails into their heads. According to prison doctors, since March, through mid August 1994, more than 30 prisoners have hammered nails into their heads by banging their heads against walls to insert the nails. Rumania holds over 45,000 prisoners in harsh, overcrowded conditions. Prison officials said nail hammering prisoners have had their sentences

lengthened in an effort to discourage the practice, to no avail. **FL:** Seven prisoners escaped from the Hendry Correctional Facility in Immokalee, FL, by stabbing a guard and climbing over two razor wire fences. Four of the escapees were captured within 24 hours of their escape. **Philippines:** Two Filipinos, jailed in 1974 for protesting the Marco's dictatorship, were compensated \$385 after spending 20 years in prison without being charged or convicted of any illegal acts. The supreme court ordered the two released and criticized the government for delaying their release after the case records were allegedly lost in a 1989 fire. The compensation amounted to \$19.25 for each year they spent in prison. **CT:** On August 9, 1994, two female prisoners escaped from the Niantic Corr. Center and were captured the next day. Two male prisoners from the minimum security prison wing at Somers escaped and were captured a few hours later on that same day. **FL:** On August 13, 1994, five prisoners at the Punta Gorda jail escaped by breaking the window out of a dormitory style trailer and climbing over a wall and razor wire. All five were recaptured the next day at a motel near the jail. **MI:** On August 21, 1994, ten prisoners serving lengthy sentences escaped from the 1,044 bed Ryan Correctional Facility near Detroit after accomplices tossed them a shotgun and bolt cutters over a fence. One prisoner sprayed guards with gunfire while the others cut holes through the prison's double fence and escaped in two waiting getaway cars. Four of the escapees were recaptured within hours of their escape as the result of a massive manhunt by the FBI, Michigan state police and local police agencies backed by helicopters. **MI:** On August 17, 1994, John Cosby, a Michigan prisoner being transported via police helicopter snatched the pilot's gun from its holster and hijacked the chopper. Cosby forced it to land on an athletic field on Detroit's East Side and fled on foot. **TX:** American Atheists Inc. (AA) announced that the Texas Department of Criminal Justice has agreed to place copies of *The Bible Handbook* in all of its prison libraries. The *Handbook* was written in 1899 by two English humanists and includes chapters, relying solely on verbatim quotes, such as: bible contradictions, bible absurdities, bible atrocities, unfulfilled prophecies and broken promises and more. AA provided to the books to the Texas DOC free of charge.

From the Editor

by Dan Pens

Greetings to *PLN* readers from the new co-editor. I have worked with Ed and Paul since nearly the very beginning, helping to type articles, writing, editing, and proof reading (an odious chore). I originally came on board when the mailing list grew to over a hundred readers because of my dBase programming skills. I developed the dBase program used by *PLN* volunteers to manage the mailing list. Over the years I have invested countless hours to help put this newsletter out each month.

I devote my time and energy to the *PLN* because I believe it is a valuable tool in the struggle for prisoners' rights and I consider it a good use of my time. *PLN* provides a much needed service to prisoner litigants, and provides a "voice" for views that get little or no play in the rightwing dominated "for profit" media.

After thirteen years of imprisonment, I recently saw the ISRB (parole board) and got an additional five years tacked onto my minimum. After explaining to my parents what the board did, why, and how, my mom said, "They can't do that .. can they?" And my dad echoed, "Why, son, their actions sound illegal!" All I could do was laugh. After thirteen years, they still don't get it. So I explained it again. "Dad," I said, "They do whatever they want. Period. Anything they do is 'legal', and it remains 'legal' until and unless a prisoner takes them to court and prevails on it. Prison officials know this. They know that 99% of the time prisoners lack the resources (or heart) necessary to challenge them in court. So they do what they damn well please, regardless of whether a court may eventually (usually years later) deem it to be 'illegal'."

So, here's to you *PLN* readers, the 1% who challenge the actions of our captors and make them answerable to the courts. Sometimes it seems like a losing battle. Pro se litigating requires lot of heart. It's frustrating. It seems like the deck is stacked against you (it is). Prisoner litigants face harassment and retaliation from their captors. There are a few "recreational" litigants who file suits just to pass the time of day. There are some "guerrilla" prisoner litigants who file suits as a way to pose a nuisance to their

captors. These are the ones who get hyped (ridiculed) in the mainstream media. The vast majority of prisoner litigants, though, are attempting to redress legitimate grievances, and we *all* benefit from their struggle. If it were not for the heroic efforts of prisoner litigants reported in each and every issue of *PLN*, we would all be imprisoned under much worse conditions.

We have had a lot of problems getting *PLN* printed and mailed on time. Please bear with us while we work to find solutions. We rely heavily on the efforts of our outside volunteers to do the layout, desktop publishing, printing, and mailing. We have always relied on volunteers as a way to keep our costs down so we can afford to publish. It reaches a point, though, when it's just too much work for volunteers to handle (they have lives, families, jobs and such). Each month since the inception of *PLN* we have had a "mailing party" in the community where volunteers get together to fold, staple, and affix address labels to each issue. This worked just fine at first. But as we continue to grow we are having to develop new solutions to answer the challenge of getting 1,200 plus issues mailed each month. You probably noticed that your *PLN* is folded lengthwise now. We have contracted with the printer to do the folding, and that is the way their machines are set up to do it. We are working on a way to get either the printer or a contract "mailing service" to affix the labels. This all costs money, of course, so remember to donate as much as you can in order to help us keep this thing going. If you are imprisoned, please try to hustle up at least a few stamps. If you send us *something*, that lets us know that you value our publication, and we'll continue to mail you issues for a few more months. If you can pony up a book of stamps, that will get you six months. Two books of stamps (or \$10-\$12) will get you a whole year.

Hopefully, by the end of the year we will have the kinks worked out, and will be printing and mailing on time again. All in all, you have been incredibly patient with us. We have thankfully not been inundated with letters from readers wondering where their issues are.

Readers in Texas prisons have had to endure an even longer delay in receiving their *PLN*. It seems the TDCJ-ID needs to "quarantine" all incoming publications. A sample of the publication is forwarded to Mail System Coordinators Panel (MSCP) for review. They decide if the publication violates any of the guidelines set out in the TDCJ-ID Correspondence Rules, specifically Rule 3.9.10.6. Who says crime doesn't pay? It sounds like prisons in Texas are a booming business creating valuable jobs. Where else can you get great pay and state benefits for reading magazines? The MSCP folks must have really enjoyed the April issue. Our Texas readers actually got their May issue before the April issue was approved and allowed to be distributed. Texas readers should note that TDCJ-ID Correspondence Rule 3.9.10.6. states in part: "If a publication is rejected, the inmate, the editor and/or publisher will be provided a written notice of the disapproval and a statement of the reason therefore *within seventy-two (72) hours of receipt of said publication* on Publication Denial Forms."

PLN readers in the Waupun Correction Institution in Wisconsin failed to get some issues at all. It seems that "corrections officials" in the mailroom there discovered they would have more leisure time if they simply tossed the third class mail in the dumpster rather than sort it and deliver it. For more details, read *Prisoner Mail Trashed at Waupun* in this issue.

Occasionally readers write and ask for copies of specific back issues. Until recently we were unable to fill requests for the December '93 and April '94 issues because we didn't have extra copies. We have had copies made, and these issues are now available. If you need a specific back issue of *PLN*, send us one dollar (or 4 stamps) to cover the copying and postage, and we'll mail you that issue. Full sets of back issues are available for \$35 per year. We are working on getting all of our back issues indexed (by case citation and subject matter) and will hopefully have indexes available by the first part of 1995.

We want to increase our subscriber base. One of the most effective ways to do that is via "word of mouth" from you, our present readers. Help us become more well known. If you send us 10 stamps and a return mailing label, we'll send you 25 copies of *PLN* to distribute to potential subscribers. Enjoy this issue of *PLN*.

Pass it onto a comrade. Tell your friends and family about us. Encourage your people on the outside to subscribe. Maybe if they read *PLN* they'll start to get a clue about how the system operates, and you won't have to struggle to explain the reality of imprisonment to them over the phone when they gasp and say, "Why, son, they *can't do that... can they?*"

Reviews

AntiShyster is a bi-monthly 48 page magazine "dedicated to raising hell for lawyers." It presents a critical examination of the American legal system, both civil and criminal. Recent articles have included non-lawyers running for judicial offices, tax laws, listing of public corruption cases by the office holder convicted, the Bar Association's monopoly on law practice, and more. Coming from a conservative view it seeks to de-mystify the legal system and make it more accessible and understandable to non lawyer citizens. Subscriptions are \$25.00 a year. Write: AntiShyster, P.O. Box 540786, Dallas, TX. 75354-0786.

Weekly News Update is the weekly newsletter of the Nicaragua Solidarity Network. Each issue comes filled with news and information not reported by the mainstream American media. In fact, *PLN* regularly reprints prison related articles from WNU and uses it as a resource for other articles. While I disagree with a lot of their political analysis, the information is detailed enough that people can draw their own conclusions from it. They are seeking to expand their circulation and will send a free sample on request. Subscriptions are a bargain at only \$25.00 a year for 52 issues. Write: NSN, 339 Lafayette St. New York, NY. 10012. (212) 674-9499.

Journal of Prisoners on Prisons is a bi-annual publication from Canada written by prisoners in the US and Canada about the criminal justice system, prisons, etc. The latest issue contains articles about an innocent man in prison (he pleaded guilty to a crime he did not commit), persecution of Native American activist Little Rock Reed, the uprising at Lucasville, OH, the Canadian parole system, book reviews and more. The publication is polished and well written. Subscriptions are \$4.00 a year for prisoners; \$10.00 a year for others. Write: JPP, Box 54, University Centre, University of Manitoba, Winnipeg, R3T 2N2, Canada.

Criminal Law Forum is a scholarly, peer reviewed journal of international human rights and criminal law. Published three times a year in a booklet format, each issue contains articles, book reviews, conference papers, publications, developments in international law and more. *CLF* can be cited in briefs and other legal papers. Subscriptions cost \$45.00 a year. Write: *Criminal Law Forum*, Rutgers Law School, 5th and Penn Streets, Camden, NJ. 08102.

Middle Ground is a quarterly magazine published by Middle Ground, a non-profit organization which advocates and provides numerous services for prisoners and their families in Arizona. The newsletter itself is 16 pages long and filled with informative articles pertaining to conditions, litigation, court decisions, etc., within the Arizona prison system. In addition to their newsletter they offer numerous services to prisoners including parole board issues, legal research, paralegal services, major infraction issues and much more. A must for Arizona prisoners and a lot of interesting information for those in other states. Subscriptions are \$3.00 a year for prisoners; \$20.00 a year for others. For more information contact: Middle Ground, 139 East Encanto Dr. Tempe, AZ. 85281. (602) 966-8116.

California Prisoner is the quarterly newspaper of the Prisoner Rights Union. The PRU is under new leadership and their paper has a new look with more focus on mobilizing to counteract anti-prisoner legislation and CDC policies. Articles include the 3 Strikes You're Out law, parole rules and hearings, health, interviews, and more. Subscriptions are \$5.00 for prisoners, \$30/25 for citizens. Write: PRU, P.O. Box 1019, Sacramento, CA. 95812-1019.

Criminal Justice in America: A Ballpark Figure is a special issue tabloid newspaper produced by the Social Workers for Social Responsibility. This issue discusses the "3 Strikes" hysteria sweeping the nation as well as criminal justice policy in general. A variety of articles, statistics and artwork make the point that current crime policy offers no solutions to any of society's problems. The paper is well produced and easy to read. One graphic makes the point that the \$2 billion spent on building 6 prisons would lift 347,000 families out of poverty, or send 579,000 kids to college or hire 53,000 teachers for California classrooms. It also lists a variety of resources and groups

working on criminal justice issues. Copies are available for a donation. Write: Social Workers for Social Responsibility, Student Activities Box 355, California State University, 6000 J St. Sacramento, CA. 95819.

Jam Rag is a bi-monthly counter culture tabloid covering the music and alternative scene throughout Michigan. They have a lot of info on drug legalization efforts as well as government persecution of hemp activists. One of the better alternative papers we've seen. They are actively seeking contributions from prison writers: articles, stories and more. Subscriptions are \$16.00 for 20 issues. Write: *Jam Rag*, Box 20076, Ferndale, MI. 48220.

Settlement News

[Editor's Note: Most of our coverage focuses on published cases which serve as legal precedent. We also report on major prison conditions litigation that is filed and its progress. Many cases are settled before trial and these are generally not reported. We are interested in reporting major settlements, i.e. those resulting in prison changes or major monetary awards, so please send us settlement information and/or unreported jury awards. We hope that by reporting this information more attorneys will take an interest in prisoner civil rights suits and it gives litigants a better idea of what their injuries are worth.]

\$273,00 Settlement for Gassing

A hallucinating diabetic was sprayed in the face with a chemical spray called "Freeze + P." after he had been arrested and tried to escape. The spray contains tear gas and a red pepper derivative. After being held in the Montgomery County, Alabama, jail for a week he was transferred to a hospital and treated for a left eye infection, dehydration, renal failure and diabetes. He lost the left eye and had been blind in the other eye since birth.

He filed suit in federal court claiming that the use of the chemical spray was unreasonable and that he received inadequate water and medical care while in jail custody. The sheriff was sued for not developing adequate medical care and screening policies. Before the case came to trial a \$273,00 settlement was reached with the county paying \$145,000 and the spray maker paying \$128,000. See: *Goodman v. Montgomery County*, US District Court, M.D. Alabama, No. CV-

92H-1170-N (May, 1993), reported in 37 ATLA L. Reporter 56 (March, 1994).

\$153,400 Awarded To Estate for Stabbing Death

An Ohio state prisoner was stabbed to death in a prison kitchen by another prisoner. The victim's estate sued the Ohio DOC claiming that because of inadequate security procedures with regards to kitchen knives and inadequate supervision of the assailant, the prisoner was killed. The suit claimed that a month before the attack the prison had adopted a new policy regarding the handling of kitchen knives but never implemented it. While the trial court had originally ruled in favor of prison officials on the liability issue, an Ohio appeals court reversed and remanded ordering further proceedings on the issue of damages alone. The trial court awarded the plaintiff \$153,400. See: *Walton v. Department of Rehabilitation and Correction*, Ohio Ct. Cl. No. 8914545, Aug. 6, 1993, reported in 37 ATLA L. Rep. 56 (March, 1994).

\$1 Million for Boiling Prisoner

Vaughn Dortch is a California prisoner held at the Pelican Bay prison control unit. After suffering mental deterioration Dortch covered himself in fecal matter. The administration ordered guards to wash it off and the guards took Dortch to the prison infirmary where they placed him in a steel tub of boiling water. Six guards shoved Dortch into the steaming water where he was held for fifteen minutes and scrubbed with wire brushes. As a result, Dortch suffered third degree burns over the lower half of his body and had to undergo skin graft treatment. No disciplinary action was ever taken against the guards. The prison administration blamed Dortch for the incident. The case was dramatically featured on the TV program *60 Minutes* where Dortch was quoted saying "I was cooking" and the prison's chief medical officer at first denied the incident had occurred.

The \$1 million award was made in October, 1993, by US District Court Judge Legge, in San Francisco, who ordered the in chamber deal with prison officials to remain secret. For more information contact: Pelican Bay Information Project, 2489 Mission St. Rm. 28, San Francisco, CA. 94110. (415) 821-6545. Reported in *Workers World*, March 24, 1994.

\$1.7 Million Settlement for Beating

A homeless man arrested for not paying a \$100 fine for shoplifting food was booked into the Los Angeles County Jail. He refused to take an X-ray test for tuberculosis and was placed into an unsupervised hallway with a much taller prisoner who had earlier been certified as mentally disturbed. The mentally disturbed prisoner beat him so severely he is now in a permanent vegetative state with brain damage. He sued the county claiming that by placing him in the hallway, unsupervised, with the other prisoner, he was placed in danger. Los Angeles county entered into a \$1.7 million settlement to prevent the case from going to trial. See: *Cubbison v. Court of Los Angeles, US District Court, Los Angeles*, No BC-0560666, reported in the *National Law Journal*, April 11, 1994.

Peruvian Government to Stand Trial for Prison Massacres

On June 19, 1986, political prisoners of the Communist Party of Peru (PCP) held at three prisons revolted demanding government compliance with agreements previously reached governing the prisoners' conditions of confinement. The Peruvian government of then President Alan Garcia refused to negotiate with the prisoners; who had seized the prisons; and sent in the armed forces who blasted their way into the prisons using artillery, helicopter gunships and rockets. Several hundred PCP prisoners were murdered by government forces, many after they had surrendered and were in government custody again.

On June 16, 1994, the Inter-American Court of Justice announced it would try Peru for the disappearance and murder of 127 PCP Prisoners of War (POWs) during the prison sieges. Juan Abugattas of Amnesty International stated "The ruling will include the government of current President Alberto Fujimori for failing to investigate and punish those responsible and pay compensation costs to families of the victims."

A trial now pending in the Inter-American Court will rule on the murders committed by government troops at the prison on Fronton Island in 1986. Several members of the Republican Guard were

punished for killing 240 prisoners at Lurigancho prison in Lima, many after they had already surrendered. But the Fujimori and Garcia governments have taken no measures against the marines who directed cannon fire into the prison wings where prisoners were barricaded. The marines later murdered the majority of the prisoners who had surrendered.

According to Abugattas, a favorable decision by the court would mean the Peruvian government would have to pay high compensation costs to the relatives of the murdered prisoners. He pointed out that in 1988 the Honduran government was ordered to pay \$700,000 for the disappearance and murder of two citizens by security forces. If the Peruvian government refuses to pay it can be held in contempt by the court and reported to the Organization of American States.

To commemorate the 1986 prison massacres, referred to by the PCP as the "Day of Heroism" PCP commandos blew up a bank in Lima on June 18, 1994. Readers desiring more information on the 1986 prison revolts in Peru and the ensuing massacre should contact: CSPP, 30-08 Broadway, # 159, Queens, NY 11106 and inquire about the availability of the booklet *Glory to the Day of Heroism* which gives first hand accounts by the prisoners of the revolt as well as its background.

Swedish Prisoners Mutiny

On July 23, 1994, prisoners at the Tidaholm Prison, 200 miles Southwest of Stockholm, Sweden, refused to return to their cells at lock up time to protest the solitary confinement given to three prisoners after a fight earlier that day. Prison officials stated that some 115 of the 165 prisoners participated. The mutineers climbed onto the roof of a workshop and threatened guards who withdrew. The prisoners also set fire to the prison's guardhouse, school and workshop.

The prisoners surrendered after a show of force by prison officials when the latter received police reinforcements from Stockholm. A prisoner interviewed on national radio said tensions had been running high at the prison due to overcrowding.

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UT DOC Violates Court Access Rights

Utah state prisoners filed a class action suit against Utah Department of Corrections (UDC) officials claiming a failure to provide them with constitutionally adequate access to the courts. The district court agreed with the prisoners and issued an injunction ordering the UDC to substantially modify its practices with regards to providing prisoners with access to the courts.

The UDC contracts with local attorneys to provide Utah state prisoners with legal assistance. In July, 1990, UDC Director Gary DeLand issued a memo stating that the legal services contract would no longer allow attorneys to provide gen-

eral legal assistance in civil matters. The only legal assistance allowed under the contract would be assistance in filing writs of habeas corpus and lawsuits challenging conditions of confinement, either in federal or Utah state courts. The prisoners contend that because they do not have access to a law library and are not allowed help from jailhouse lawyers, the minimal legal assistance provided by contract was insufficient to allow them meaningful access to the courts. Specifically, they were denied assistance in the following types of legal action: divorce actions; personal injury suits; civil rights suits under 42 U.S.C. § 1983 against non-UDC employees; workers comp claims; breach of contract claims; property forfeiture actions; securing case law and procedures for pro se criminal appeals and civil rights actions; petitions for certiorari to the US Supreme Court; adoptions; name changes; tax assessments; paternity actions; real estate disputes; probate matters; out of state litigation, bankruptcies and more.

The court notes that it is well established that prisoners have a right of meaningful access to the courts. See: *Bounds v. Smith*, 430 US 817, 97 S.Ct. 1491 (1977). States have an obligation to ensure that all prisoners have such access. The Supreme Court has left it an open question of whether law libraries or contract attorneys, alone or in combination, are sufficient to provide meaningful access to the courts for prisoners. In this case the UDC defendants contended that they were only obligated to provide assistance in habeas corpus and prison civil rights litigation. The court rejected this argument. In doing so the court gives an extensive discussion and analysis of *Bounds*, tenth circuit and other circuit

court access cases that should be read by anyone litigating this type of claim.

The UDC defendants claimed that if forced to provide legal access to prisoners, budget constraints would force it to cut prisoner programs. The court was not persuaded that any excessive costs would result from ordering the UDC to provide prisoners with meaningful legal assistance. While economic factors may be considered "in determining the method used to provide meaningful access to the courts, the cost of protecting the right of access cannot be used to justify its denial." The court noted that prisoners have no right to jobs, rehabilitation or educational programs but they do have a constitutional right of access to the courts. Providing such programs is a legitimate penological goal but prison officials cannot choose to provide them at the expense of a constitutional right. The decision to fund such programs must be made by the legislature, not the court.

In addressing the plaintiffs' specific claims the court held that the UDC must provide legal assistance in the following types of cases: in all civil rights cases in state or federal courts, this includes preparation of all papers needed to get a prisoner into court, including IFP petitions and motions for appointment of counsel; in all habeas cases; for Utah prisoners housed out of state in either federal or other state prisons. The UDC must also assist boarder prisoners from other states, housed in Utah prisons, who seek to assert claims in Utah courts. The court gave special attention to legal assistance in the area of familial relationships, i.e. divorces, parental rights, etc.

Contract attorneys must also assist prisoners in small claims and workers

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Court Access (continued)

compensation cases. No assistance in adoption proceedings was required.

The court held that prisoners are not entitled to any legal assistance beyond the initial pleading stage. In other words, once they are in the courthouse door they are dumped there unable to pursue a legal action on their own unless the court decides to appoint counsel. The contract attorneys must assist in the filing of amended complaints if ordered to do so by the courts. The court ruled that the contract attorneys have no obligation to give prisoners case citations for use in pending pro se civil rights cases or criminal appeals. Prisoners are not entitled to any assistance in filing writs of certiorari to the Supreme Court nor for name changes. Likewise, prisoners are not entitled to assistance in personal injury suits (where the court has discretion in appointing counsel), breach of contract claims and in collections matters. The court issued an injunction ordering the UDC to comply with its ruling and awarded the prisoner plaintiffs attorney fees. See: *Carper v. DeLand*, 851 F. Supp. 1506 (D Utah 1994).

UT § 1983 Statute of Limitations Struck Down

In 1987 the Utah state legislature enacted section 78-12-28(3) which provided a two year period in which to bring an "action for injury to the personal rights of another as a civil rights suit under 42 U.S.C. § 1983." This is the only law of its type in the country. In the past, other states have passed similar statutes affecting § 1983 actions and they have been struck down. § 1983 does not provide a statute of limitations to actions brought under its provisions. Federal courts generally rely on a state's general or personal injury statute of limitations in determining if a § 1983 action has been filed in a timely manner. Because § 1983 suits only apply to state government officials (and their agents) for violating citizens' constitutional rights, state legislatures have periodically sought to limit its reach by imposing severe time limits on its exercise.

In 1988 a Utah citizen arrested but later acquitted on charges of selling a stolen firearm sued a county, sheriff and two deputies under § 1983 alleging false arrest. The district court dismissed the suit holding that it was not filed within the two years required by 78-12-28(3). See: *Arnold v. Duchesne County*, 810 F. Supp. 1239 (D UT. 1993).

The court of appeals for the tenth circuit reversed and reinstated the suit holding that the statute was illegal because the Utah legislature "has both usurped the role of federal law in characterizing the essence of such actions and has eliminated the assurance that neutral rules of decision will apply to section 1983 actions in Utah." This is inconsistent with federal law and practice.

The appeals court noted that one of the reasons expressed in the statute's legislative history was to curtail § 1983 actions, especially by Utah prisoners. The court held this motivation was at odds with the broadly remedial purpose of § 1983. See: *Arnold v. Duchesne County*, 26 F.3d 982 (10th Cir. 1994).

State Must Provide Assistance for Parental Suits

Women prisoners in Michigan filed a class action suit against the Michigan Department of Corrections (DOC) challenging the decision to reduce funding to Prison Legal Services in order to end PLS assistance in parental rights matters. The prisoners argued that the decrease in PLS funding and prohibition of assistance in parental rights matters denied them their right of access to the courts and constituted contempt for previous court orders in this long running suit. In *Glover v.*

Johnson, 478 F. Supp 1075 (ED MI 1979) the court concluded that female prisoners were denied their right of access to the courts, among other equal protection violations, and ordered extensive changes to safeguard the prisoner's legal rights. The court had previously, in 1979, ordered the DOC to fund PLS representation of prisoners in child custody disputes and/or neglect actions. The defendants never sought modification of the order and continued funding PLS to provide representation in these areas. The DOC sought to halt funding for PLS representation in parental rights cases as of February 28, 1994. The court held that this was not allowed by its previous orders and found the DOC to be in contempt of court. The court granted the prisoner's motion for injunctive relief and ordered the DOC to continue funding of PLS at previous levels to ensure prisoners are represented in parental matters. As a constitutional matter the court held: "In the area of parental rights, legal assistance is required because the provision of an adequate law library and some paralegal assistance, alone, is insufficient to provide meaningful access to the courts. I conclude that the maintenance of parenthood is a fundamental right which is entitled to protection under the constitution. Incarcerated mothers have a right to, and the Department is obligated to provide, legal assistance in parental rights matters affecting their children so as to be able to be represented in court."

In *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992) the appeals court upheld two district court rulings that had concluded Michigan state prisoners were denied their right of access to the courts by DOC policies. In this case the DOC contended that under *Knop* they were only required to assist prisoners in post conviction matters and in suing over conditions of con-

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finement. The court concluded that *Knop* was not applicable to this case because the legal needs of female prisoners differ from those of male prisoners. While such a limit is constitutional for male prisoners "There is no basis to conclude that this same limitation would be placed on female prisoners, particularly, when they are faced with the loss of a fundamental right, the right to the custody of their children."

Previous appeals court rulings in this case have underscored the fact that what constitutes meaningful court access for male prisoners may not be sufficient to provide meaningful access for women prisoners who "lack their male counterparts' history of self-help in the law." See: *Glover v. Johnson*, 855 F.2d 277 (6th Cir. 1988). The district court concluded that simply because an adequate law library and legal assistance may not be required for male prisoners does not mean the same limitation applies to female prisoners faced with similar court access problems.

In analyzing the constitutional requirement that prisoner's access to the courts be "meaningful" the court discusses the structure of Michigan state courts pertaining to mother's exercise of their parental and custodial rights. The court concluded that because of the court structures involved "there can be no meaningful access without the assistance of an attorney who is able to interface with the court and its agency. PLS, through its legal assistance to the inmate mothers, provides the vital method by which a pro bono or court appointed lawyer can represent the inmate mothers in court." The court held that in this case "meaningful access can only be achieved with legal assistance."

The court gave an extensive analysis of the legal right to exercise parental rights and responsibilities, with the accompanying interest by the state and parents that decisions made regarding childrens well being be informed and improve the childrens quality of life. The state's interest diverges from the parents in that they want the decisions made as cheaply as possible, appointing counsel and allowing imprisoned parents to exercise their rights is likely to increase the cost. The court held that because a fundamental right is at stake the DOC has to provide the means for the parents to exercise that right. Just as prisons or jails must assist women in asserting their right to an

abortion they must assist them in actively and effectively asserting their parental rights. Prisoners cannot effectively assert these rights due to their poverty and incarceration, thus it is necessary for the DOC to continue funding the PLS to provide these services. This is an important case that should be read by anyone contemplating litigation in this area of law. Due to the specific facts of the case it is likely to only apply to female prisoners. See: *Glover v. Johnson*, 850 F. Supp 592 (ED MI 1994).

Change in Parole Eligibility Actionable Under § 1983

Thomas Lewis is a Tennessee state prisoner convicted in 1984 and sentenced to 30 years in prison. At the time of his conviction prisoners became eligible for parole consideration after serving thirty percent of their sentence. In 1989 the Tennessee DOC enacted Administrative Policy and Procedure 502.02 which allowed a prisoner's parole eligibility date to be extended if the prisoner were found guilty of assault by a prison disciplinary board. In 1990 Lewis was found guilty of assault by a disciplinary board and his parole eligibility date was extended by an additional thirty percent.

Lewis filed suit under 42 U.S.C. § 1983 claiming that policy 502.02 violated the Ex Post Facto provisions of the US constitution by increasing the punishment of a crime after it occurred. The district court dismissed the suit and held that the claim had to be brought under the habeas corpus statutes. Lewis duly filed his claim as a writ of habeas corpus and the court dismissed it for having failed to exhaust state remedies. Lewis filed a motion asking the court to reconsider its ruling and the court did.

The court relied on *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir. 1993) and *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991) to hold that where prisoners challenge the parole eligibility process, and do not claim they are entitled to parole, the claim can be brought under section 1983. This is an important distinction because § 1983 has no requirement that state remedies be exhausted and allows for a court to enter injunctive and declaratory relief.

The court granted the motion for reconsideration and ordered that the § 1983 claim be reopened and consolidated with the habeas petition. The court did not reach the actual merits of the case, i.e. whether the policy actually violates the Ex Post Facto clause. See *Lewis v. Driskell*, 850 F. Supp 678 (MD TN 1994).

Sexual Assault by Police States Claim

Susan Huffman was arrested by Pacific Grove Police and taken to the police station to be held pending a recognizance hearing. During the booking procedure a policeman molested and sexually assaulted her as two other policemen ignored her cries for help, looked on and laughed at her. She remained in jail for three days and during this period jail officials refused to allow her to shower, make phone calls or have reading material. While in jail she was hog-tied in her cell and taken to court where she remained hog tied on the floor of a holding cell for four hours. The restraints caused her significant injury. On another occasion, while returning to jail her bare feet were stomped on by police after she told them she was going to file suit in federal court concerning her treatment. Huffman did file suit claiming that the above treatment violated her constitutional rights. The district court granted her *In Forma Pauperis* status to proceed and gave a brief legal analysis of the claims.

While pretrial detainees are not subject to the protection of the eighth amendment's ban on cruel and unusual punishment they are protected by the 14th amendment's due process clause which forbids punishment without due process of law. The fourteenth amendment provides greater protection to unconvicted detainees.

The court notes that prisoners and detainees retain a right to bodily privacy. This includes the right to shield one's naked body from strangers, especially those of the opposite sex. Under this standard Huffman stated a claim against the policemen who allegedly sexually assaulted her. The assault would violate her fourth amendment right to privacy. The policemen who stood by and watched the assault would also be liable for failing to protect her from harm.

Sexual Assault (cont.)

While being deprived of a shower for three days would not ordinarily state a claim, in this case it did because it was under the circumstances of Huffman being sexually assaulted. Moreover, other prisoners were allowed to shower during this same time period. The court dismissed the claims concerning verbal harassment and abuse because such behavior by police and guards does not violate the constitution.

The excessive force allegations stated a claim because the hog-tying and foot stomping could be found by a jury to violate due process. She also stated a claim for retaliation where she told police she would sue them and they stomped on her bare feet and when she was denied a shower after reporting the rape to a woman's crisis center. Readers should note that this is not a ruling on the merits of the case. The court only determined that Huffman had alleged sufficient facts to entitle her to proceed without prepayment of costs and fees. See: *Huffman v. Fiola*, 850 F. Supp 833 (ND Cal. 1994).

Refusal to Help Prisoner Eat Illegal

A Wisconsin state prisoner suffering from amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's disease, had difficulty eating due to weakness in his arms, hands, jaw, facial and throat muscles used in eating due to the disease's progression. Part of the treatment for ALS is good nutrition. He filed suit in Wisconsin state court claiming that prison doctors were deliberately indifferent to his serious medical needs by not providing him with assistance in eating after it was clear it had become difficult for him to eat without assistance. The suit also claimed that the DOC classification chief had acted with deliberate indifference by delaying his transfer to another prison where such assistance was more readily available. The trial court dismissed his suit.

A Wisconsin state appeals court reversed, ruling that the prison official defendants were not entitled to qualified immunity. It held that the facts, as alleged by the suit, were sufficient to state a claim for violating the prisoner's eighth

amendment rights. Because the prisoner "suffers from a serious medical condition, and treatment of the condition includes adequate nutrition," deliberate indifference to the need for feeding assistance violates the eighth amendment. "And if he cannot obtain that assistance in one prison but can relieve it in another, deliberate indifference in failing to effect his transfer violates the eighth amendment." See: *Santiago v. Leik*, 508 N.W.2d 456 (Wis. App. 1993).

RFRA Must Be Argued on Merits

Prisoners at the Nebraska State Penitentiary filed suit under the Religious Freedom Restoration Act (RFRA) 42 U.S.C. § 2000bb claiming that prison officials had violated their right to practice their religion. The prisoners are adherents to Asatru, an Icelandic term for the ancient religion of the Teutons of Northern Europe. Prison officials moved for summary judgment claiming that the restrictions they had placed on the prisoners religious exercise were related to prison security.

The court denied the motion on its merits because prison officials had based their argument around the Supreme Court decision in *O'Lone v. Estate of Shabazz*, 482 US 342, 107 S.Ct 2400 (1987) which dealt with prisoner's 42 U.S.C. § 1983 challenge to prison officials restrictions on religious exercise. The district court noted that the RFRA was especially enacted to overrule *O'Lone* and applied to state prisoners retroactively. [See: *PLN*, Vol. 5, No 6 and 7]. Because prison officials had crafted their argument around *O'Lone* they had not addressed one of the RFRA issues on which they bore the burden of proof: whether they employed the "least restrictive" means of furthering a compelling governmental goal. Thus they could not succeed on their motion for summary judgment.

The district court did, however, grant the defendants qualified immunity for money damages in their official and individual capacities. Government officials cannot be sued in their official capacities because it is forbidden by the eleventh amendment. Because the RFRA was not enacted until after this suit was filed prison officials could not be expected to

comply with it and their conduct arguably complied with the constitutional standard set forth in *O'Lone*. These rulings did not affect the prisoners claims for injunctive and declaratory relief, only their claims for money damages. See: *Rust v. Clarke*, 851 F. Supp 377 (D Neb 1994).

Admin Reversal Doesn't Affect Disc. Hearing Suit

Robert Walker is a New York state prisoner. During a search of Walker's cell prison guards found a knife and excess bedding and infraacted him for their possession. At his disciplinary hearing Walker pleaded not guilty and maintained the knife and bedding belonged to the cell's previous occupant as he had only recently moved into the cell. Walker specifically requested the unit sergeant and the guard assigned to the area to appear as witnesses at the hearing to support his defense. The hearing officer denied the request without explanation, found Walker guilty of the offenses and sentenced him to six months in segregation. Walker administratively appealed the decision which was reversed over two months after he began serving the sentence. No new hearing was held and he was released from segregation about two weeks after the reversal. Walker then filed suit under § 1983 claiming that the denial of witnesses at his disciplinary hearing violated his right to due process.

The district court dismissed the suit ruling that the administrative dismissal of the infraction cured any due process defect in the initial hearing. The court of appeals for the second circuit reversed and remanded holding that a cause of action under § 1983 accrues when the constitutional violation occurs and administrative action after the fact does not bar suit.

The appeals court gave an extensive discussion of New York state prison rules governing the placement of prisoners in Special Housing Unit (SHU) and the conduct of disciplinary hearings. The procedures established by the New York DOC comport with the due process procedural rights in disciplinary hearings established by the Supreme Court in *Wolff v. McDonnell*, 418 US 539, 94 S.Ct. 2963 (1974). Among the rights established by the su-

preme court, and codified by the NY DOC, is the right to call witnesses at disciplinary hearings. The denial of a prisoner's request for witnesses at a hearing, without any explanation, is a compensable constitutional due process violation. The only question in this case was whether the administrative appeals scheme provided by New York's regulatory scheme cured the violation.

The court notes that *Cleavinger v. Saxner*, 474 US 193, 106 S.Ct. 496 (1985), is almost factually identical to this case where prisoners were denied their right to call witnesses at a disciplinary hearing, were found guilty and on administrative appeal, were found "not guilty." They sued, were awarded damages by a jury and the verdict was upheld by both the seventh circuit appeals court and the US Supreme Court. In *Cleavinger* the supreme court held that prison disciplinary hearing officers were only entitled to qualified immunity for violating constitutional rights at disciplinary hearings. The appeals court in this case gave an extensive overview of their rulings in prison disciplinary hearing cases, both on the issues of immunity from damages, rights at hearings and the effect of administrative appeals on later lawsuits.

"The rule is that once prison officials deprive an inmate of his constitutional procedural rights at a disciplinary hearing and the prisoner commences to serve a punitive sentence imposed at the conclusion of the hearing, the prison official responsible for the due process deprivation must respond in damages, absent the successful interposition of a qualified immunity defense." While the defendant in this case may yet successfully raise a qualified immunity defense "We hold only that Walker's success in the administrative appeal process does not bar his section 1983 claim and that his complaint states a claim for relief." See: *Walker v. Bates*, 23 F.3d 652 (2nd Cir. 1994).

Disputed Disciplinary Facts Require Reversal

Michael Mays is a New York state prisoner who was infraacted for allegedly refusing to return to his cell when a guard ordered him to do so. After a disciplinary hearing Mays was found "guilty" and sentenced to segregation, loss of good

time and privileges. He appealed the finding to the prison warden claiming that he was never served with a copy of the infraction report nor advised of his rights at the hearing, which was held without him. The warden reversed the infraction for "procedural error" and ordered Mays' records expunged. By that time Mays had served the segregation and loss of privileges sentence imposed at the hearing.

Mays filed suit under 42 U.S.C. § 1983 claiming that his due process rights were violated at the hearing. The district court dismissed the suit ruling that even if Mays' rights were violated the administrative reversal by the warden cured any constitutional defect at the hearing.

The court of appeals for the second circuit reversed and remanded. The state claimed that Mays was served with a copy of the report but refused to sign for it, that he was advised of his rights at the disciplinary hearing but waived them. Mays claimed he was not served with the report and did not waive any of his rights at the hearing which he was not allowed to attend. The appeals court held that this creates a factual dispute which the lower court erred by resolving in the defendant's favor by granting them summary judgment. The factual dispute must be resolved by a jury to determine if Mays' rights were in fact violated at the hearing, whether the violation was committed by the hearing officer or by the guard who claimed Mays waived his right to attend the hearing and whether there is a basis for qualified immunity.

The appeals court noted that its companion case, *Walker v. Bates*, 23 F.3d 652 (2nd Cir. 1994), held that the administrative reversal of a disciplinary hearing finding does not cure a constitutional violation at the hearing if punishment is imposed as a result. [See *previous article*]. Thus, Mays' cause of action occurred at the time his rights were violated despite the fact the infraction was later dismissed on appeal. See: *Mays v. Mahoney*, 23 F.3d 660 (2nd Cir. 1994).

Attorney Fees for Contempt Hearing

Jail prisoners of the Natrona County jail in Wyoming initiated contempt proceedings against jail officials for not having complied with the terms of a consent decree entered into between prisoners and jail officials over jail conditions. The dis-

trict court concluded that the county jail officials were indeed in contempt and entered an order detailing the officials' failure to abide by the decree. The prisoners' attorneys then sought an award of attorney fees pursuant to 42 U.S.C. § 1988.

The court concluded that the prisoners' attorneys were entitled to attorney fees. The primary issue addressed by the court in its ruling was whether out of town attorneys should be reimbursed at the local, Wyoming, rate or the out of town rate based on where counsel is located. In this case, the prisoners' attorney Stephen Pevar of the Denver ACLU, sought \$150 an hour. The court awarded him \$150 an hour for a total fee award of \$41,340, which would be paid to the ACLU.

The court awarded Pevar rates and litigation costs related to the contempt hearing (phone, postage, copying, depositions, etc.) based on Denver rates. The main reason relied on by the court was the fact that no Wyoming attorney was or is willing to undertake jail institutional reform litigation, has the resources, expertise or inclination to do so. Moreover, Pevar has extensive experience in jail reform litigation which no local attorney had. See: *Kersch v. Board of County Commissioners of Natrona County*, 851 F. Supp. 1541 (D WY 1994).

Failure to Treat Teeth States Claim

Mark Kinney is a Missouri state prisoner. Kinney went to the prison dentist, Dr. Kalfus, for removal of a tooth that was chipped and decayed, to have a cavity filled and for treatment of gum disease. Kalfus pulled the wrong tooth and acknowledged doing so at the time. The extraction site later became infected requiring further treatment. Kalfus refused to fill in the cavity, extract the infected tooth or treat the gum disease despite Kinney's complaints that he was in pain, his gums were bleeding and he had difficulty eating.

Kinney told Kalfus he would sue him for malpractice for having removed the wrong tooth and failing to treat him. Kinney filed several administrative grievances requesting to receive immediate dental treatment from a dentist other than Kalfus. Kalfus was the official who reviewed the grievances and, not surpris-

Failure to Treat (cont.)

ingly, he denied the requests. Six months after he had initially sought treatment, Kalfus filled the cavity and another dentist extracted the infected tooth. Kinney filed suit under § 1983 claiming that the lengthy delay in treatment of his tooth problems violated his eighth amendment rights. The defendants moved for summary judgment and sought qualified immunity from damages. The district court denied both motions and set a trial date. The defendants filed an interlocutory appeal concerning the denial of qualified immunity and the court of appeals for the eighth circuit affirmed the lower court's denial.

The appeals court, in a brief opinion, notes that prisoners have a right to prompt treatment of their serious medical needs, see: *Estelle v. Gamble*, 429 US 97, 97 S. Ct. 285 (1976). This court has previously held that delaying dental care for a three week period, despite knowledge that a prisoner is suffering severe pain, states a claim for a § 1983 violation. See: *Fields v. Gander*, 734 F.2d 1313 (8th Cir. 1984). Thus, a reasonably competent prison dentist knew or should have known that not treating a prisoner's dental needs would violate clearly established law.

The appeals court held that due to the factual disputes in the case, i.e. whether Kalfus refused to treat him in retaliation for Kinney suing him for malpractice, the lower court had correctly denied the defendants qualified immunity. See: *Kinney v. Kalfus*, 25 F.3d 633 (8th Cir. 1994).

Idaho Cons Entitled to Pen & Paper

This is an Idaho criminal case which addresses prisoner's right of access to the courts in the habeas context, we address only that part of the case dealing with prison conditions. In 1989 James Free was convicted and sentenced to a term of three to ten years with the district court retaining jurisdiction for 180 days. Free was committed to an Idaho DOC facility and near the end of the 180 day period the DOC held a hearing to review Free's suitability for probation. The DOC held he

was not suitable for probation and the district court duly ordered him to serve his sentence.

Free appealed claiming that his due process rights were violated by the DOC Jurisdictional Review Committee, which was the body that submitted the prison recommendation to the judge. At the time of the hearing Free was held in administrative segregation and he had requested paper and writing tools to prepare a written rebuttal statement at the hearing. Prison officials refused his request. The Idaho court of appeals held that the denial of writing materials violated Free's right to due process and of access to the courts.

Probation recommendation hearings held by the Idaho DOC are neither recorded nor transcribed. A committee member prepares a summary paraphrasing the prisoner's oral statement. Unless the prisoner submits a written statement his views will never reach the sentencing judge. Free claimed his oral statement was mischaracterized by the committee when it was sent to the judge.

The court notes that in *Bounds v. Smith*, 430 US 817, 97 S.Ct. 1491 (1978), the supreme court held that in order to ensure prisoner's right of access to the courts, prison officials supply prisoners with paper, writing tools, notary services and postage. The court in this case cited several rulings from other federal courts to this same effect and held that the denial of paper and pen violated Free's right of access to the courts because it left him no means with which to communicate to his sentencing judge that probation was appropriate for him. The court did note that prisoners in this type of proceeding are not entitled to counsel, law library access or law clerk assistance, just pen and paper. The court ordered a new probation suitability hearing held. See: *Free v. State*, 874 P.2d 571 (Idaho App. 1993).

4th Cir. Clarifies 8th Amendment Standard

In the May, 1994 issue of *PLN* we reported *Norman v. Taylor*, 9 F.3d 1078 (4th Cir. 1994) in which the appeals court reversed the dismissal of a Virginia jail prisoner's § 1983 suit which alleged that a jail sergeant had hit him in the face and thumb with a set of keys after he had tried to smoke. After that opinion was publish-

ed the appeals court granted a rehearing en banc and reinstated the dismissal of the suit. In doing so the court held that the prisoner, Norman, had not alleged sufficient injury to state a claim for an eighth amendment violation.

In *Hudson v. McMillian*, 112 S.Ct. 995 (1992) the Supreme Court ruled that prisoners filing eighth amendment claims involving excessive use of force in non-emergency situations need not claim "significant injury" in order to succeed. The appeals court in this case has taken that to mean that "*Hudson* does not suggest, much less hold, that the extent of injury is irrelevant to whether excessive force has been employed and therefore that an excessive force claim cannot be defeated by evidence that the plaintiff's injury was de minimis." In making this ruling the court agreed with two other post *Hudson* cases: *Cummings v. Malone*, 995 F.2d 817 (8th Cir. 1993) and *Rankin v. Klevenhagen*, 5 P.3d 103 (5th Cir. 1993).

In this case the court held that "... absent the most extraordinary circumstances, a plaintiff cannot prevail on an Eighth Amendment excessive force claim if his injury is de minimis." In a footnote the court acknowledged that there may be situations in which a prisoner receives little or no enduring injuries but nevertheless will have suffered an impermissible infliction of pain. The court believes that the use of force of that nature would be of the type "'repugnant to the conscience of mankind' and thus expressly outside the de minimis force exception. . . or the pain itself will be such that it can properly be said to constitute more than de minimis injury."

In reinstating the dismissal of the suit, the court held that Norman had not presented any evidence to either show he had suffered the injuries he had claimed nor that the force was not legitimately used to restore order and discipline in the jail. Five judges dissented from this ruling holding that the injuries alleged by Norman were not de minimis and that he was not given an opportunity to rebut the defendant's summary judgment motion. See: *Norman v. Taylor*, 25 F.3d 1259 (4th Cir. 1994) (en banc). The previous citation should not be used as this ruling has superseded it.

Prison Alcohol Program May Violate Free Speech

The Iowa Civil Liberties Union (ICLU) and prisoners at the Clarinda Correctional Facility (CCF) filed suit under § 1983 challenging the DOC's expenditure of taxpayer funds on an alcohol rehabilitation program called "The Other Way." According to the complaint, this program has a heavy religious component which requires participants to believe in god in general and christianity in particular. CCF prisoners were required to attend the program in order to receive parole consideration. In this case the court did not reach a ruling on the merits in considering prison officials' motion for summary judgment but it did give a detailed analysis of the relevant case law to be used in analyzing this type of claim.

The court held that because the establishment clause of the constitution prohibits the expenditure of government funds on religious activity, the ICLU and any taxpayer has standing to challenge such expenditure. In this case, the ICLU had taxpayer standing, both in its own right and as a representative of its members, to challenge the expenditure of prison funds on "The Other Way."

The defendant prison officials sought dismissal of the action on grounds of mootness because none of the prisoner plaintiffs are still at CCF. The court responded by certifying the case as a class action for all present and future CCF prisoners who may be required to attend the program. The court also gave a discussion of the factors to be considered in ruling on motions for injunctive relief. In this case those factors were met because the program was too short (12 weeks) for participants to fully litigate it prior to the activity ceasing and there is a reasonable expectation that CCF prisoners will again be subject to the action in the absence of court action.

In analyzing the plaintiffs' establishment claims the court rejected reliance on *Stafford v. Harrison*, 766 F. Supp 1014 (SD Iowa, 1991) where the court held that participation in an AA type 12 step program did not violate the establishment clause. Instead, the court relied more on *Warren v. Orange County Dept. of Probation*, 827 F. Supp. 261 (SD NY

1993), which held that forcible participation in an AA program violated the plaintiff's establishment clause and free speech rights. Both this court and *Warren* rejected application of the supreme court's "reasonableness test" of *Turner v. Safely*, 482 US 78, 107 S.Ct. 2254 (1987), holding that establishment clause cases involving prisoners are governed by the balancing test in *Lemon v. Kurtzman*, 403 US 602, 91 S.Ct. 2105 (1971). *Lemon* held that the establishment clause forbids the government from coercing anyone to support or participate in religion or its exercise or favoring one religion over another. To survive a challenge under *Lemon* the challenged government activity or statute must 1) have a secular purpose; 2) its primary or principle purpose must be one that neither advances or inhibits religion; and 3) must not foster excessive government entanglement in religion.

The court did not state whether or not the program at issue in this case actually violated the plaintiffs' rights or not. It did hold that the defendants were entitled to qualified immunity because a reasonable prison official would not have known in 1991 that forcing prisoners to attend a religiously oriented alcohol program would violate the participants' rights. Presumably the court will eventually decide the case on the merits. See: *Scarpino v. Grossheim*, 852 F.Supp. 798 (SD Iowa, 1994).

Transferee Entitled To Sending State Case Law

James Clayton is an Oklahoma state prisoner subjected to an involuntary out of state transfer to New Mexico. Clayton had several pro se legal matters pending in Oklahoma state courts at the time of his transfer. The New Mexico prison system did not have any Oklahoma legal materials and relied extensively on an "exact cite" paging system to provide law library access. Clayton sued New Mexico prison officials under 42 U.S.C. § 1983 claiming that they had violated his right of access to the courts by not providing him with Oklahoma legal materials and by using the "exact cite" paging system. The district court dismissed the suit holding that the proper defendants were Oklahoma prison officials, not New Mex-

ico officials. The court did not address the "exact cite" claims. The court of appeals for the tenth circuit affirmed in part and remanded in part.

"In the context of denial of access claims, the general rule imposes upon the sending state authorities the responsibility for ensuring their prisoners incarcerated in sister state facilities are afforded access to state courts." The appeals court rejected Clayton's argument that *Rich v. Zitnoy*, 644 F.2d 41 (1st Cir. 1981) required receiving prison officials to provide legal materials from the sending state because *Rich* involved a state prisoner sent to a federal prison. "...we adopt the consensus that it is the sending state which bears the burden of providing the required state legal materials as stated by the district court."

The appeals court remanded Clayton's challenge to the exact cite system back to the district court for consideration on its merits. See: *Clayton v. Tansy*, 26 F.3d 980 (10th Cir. 1993).

Retaliation Suit Requires Trial

Allan Dillon is a Virginia state prisoner who was raped by another prisoner. Lawrence Dury was the Virginia DOC (VDOC) internal affairs investigator assigned to investigate the rape. During a search of Dillon's cell pursuant to the investigation, Dury discovered papers indicating that Dillon was in the process of filing a lawsuit against him and another VDOC employee. Dillon claimed that while interviewing him concerning the assault Dury ordered him to remove him from the suit and threatened to impede Dillon's early release from prison if he did not comply. Dury filed charges of filing a false report against Dillon, which were later dismissed by a state judge who found there was sufficient evidence to suggest that a rape had in fact occurred as Dillon claimed. Dillon filed suit under 42 U.S.C. § 1983 against Dury and other VDOC employees claiming that their actions violated his right of access to the courts by retaliating against him after they learned he was in the process of filing suit against them.

The defendants filed for summary judgment and the district court granted it with regards to some of the defendants and denied it for others. The court notes

Retaliation Suit (cont.)

that prison officials are forbidden from retaliating against prisoners who exercise their right of access to the court by suing prison officials or otherwise complaining about prison conditions. In order to win a retaliation claim, the prisoner-plaintiff just show that his litigation activities were the actual motivating factor for the retaliation. This is also known as the "but for" standard where the fact finder must determine if the given action would have been taken "but for" the legal activities. There is some difference between the circuits on what standard should be used in prison retaliation cases. Litigants in the fourth circuit engaged in this type of litigation should study this case.

The court held that Dillon had alleged sufficient facts to survive a summary judgment challenge. Because the defendants, specifically Dury, denied retaliating against him, there was a material issue of fact requiring a trial by jury to resolve. The court dismissed the suit against several of the supervisory prison officials who were not shown to be involved in any of the alleged retaliatory activities. See: *Dillon v. Murray*, 853 F. Supp 199 (WD VA, 1994).

Retaliation for Grievances Illegal

Gary Hines is a California state prisoner. Hines filed suit claiming that prison guards had broken his television set in retaliation for administrative grievances he had filed against them. After filing a grievance against the guards who allegedly broke his television, another guard infringed him for allegedly tampering with the seals on his television and confiscated the TV. At a disciplinary hearing Hines was found guilty and told that if he received another infraction within 90 days he would be forced to ship his TV out of the prison. Hines was later infringed and as a result lost his TV. He filed suit under 42 U.S.C. § 1983 claiming that the breaking of his TV set and the different infractions were a result of retaliation against him by prison officials after he filed administrative grievances against prison staff.

The defendant prison officials sought summary judgment claiming that the filing of administrative appeals by prisoners is not a constitutionally protected activity

and therefore retaliation for such filings is not actionable under § 1983. The district court denied the motion and gave an extensive discussion of the law relevant to retaliation claims in general and those involving prison administrative grievances in particular.

"To establish a claim of retaliation under 42 U.S.C. § 1983, plaintiff must first establish that he engaged in constitutionally protected activity and second that his conduct was a substantial or motivating factor behind the supposedly retaliatory acts. . . . If plaintiff meets this burden, the defendants are entitled to show that they would have taken the same actions even in the absence of the protected conduct."

The court notes that prisoners are not constitutionally entitled to a prisoner grievance system. But, once such a system is established, a prisoner's use of administrative grievances is constitutionally protected under the first amendment right to petition the government for the redress of grievances. The court cites several cases from other circuits which have held prisoners' use of grievance systems are constitutionally protected and prison officials' retaliation against prisoners who use the grievance system is unconstitutional.

The court rejected the defendants' arguments that because state regulations provide that "no reprisal shall be taken against an inmate or parolee for filing an appeal" the retaliation issue should be left to state courts to remedy. As an analogy the court noted that had Hines written the governor to complain of prison conditions that activity would also be constitutionally protected. The court saw no difference between that and using a state established procedure to complain of prison conditions to the prison administration, also an executive branch of the government. "In the court's view, to hold otherwise would trivialize the plaintiff's right to petition the government." See: *Hines v. Gomez*, 853 F. Supp. 329 (ND Cal. 1994).

Shortened Pens States Claims

Two prisoners in the segregation unit of the Waupun Correctional Institution at Waupun, Wisconsin, filed suit challenging the prison's practice of issuing segregation prisoners only the ink tube portion of a ball-point pen with which to write.

Prisoners who modify the ink tube in anyway are only allowed a crayola crayon with which to write. The prisoners claimed they had litigation pending in the courts and as a result of the ink tube practice it was difficult for them to write pleadings in a legible manner; making carbon copies is impossible due to the tube's softness and writing with the tubes causes painful cramps and aches which discourages the prisoners from pursuing legal and administrative remedies. The prisoners filed suit under § 1983 claiming that the ink tube practice violated their right of access to the courts and sought a Temporary Restraining Order (TRO) to halt the practice while it is litigated.

The court did not rule on the merits of the case. But, in its published opinion the court reviewed the claim under 28 U.S.C. § 1915(d) and held the claim was not legally or factually frivolous and that it stated a claim upon which relief could be granted. The court notes that in order to assure prisoners' right of meaningful access to the courts, pen and paper must be provided by prison officials but was unsure as to what exactly constitutes a "pen." Several cases involving access to writing instruments are cited.

Because the plaintiffs had stated a valid claim, the court ordered service on the defendant prison officials and ordered the defendants to respond to the TRO motion. See: *Kirsch v. Smith*, 853 F. Supp 301 (ED WI 1994).

Detainees Can't Be Forced to Work

Dickie Cokeley is an Arkansas state prisoner. While confined in the Arkansas DOC his criminal conviction was reversed by a federal court. Upon reversal of his conviction Cokeley asked prison officials to place him on an unassigned work status. They refused to do so and ordered him to work, when he refused to work he was infringed and punished. Cokeley filed suit under 42 U.S.C. § 1983 claiming that forcing him to work while his status was that of a pretrial detainee violated his right to due process and forced him into involuntary servitude, i.e. slavery. He also claimed his right of access to the courts was violated when prison officials denied his request to call his attorney. The district court dismissed the suit as being frivolous under 28 U.

S.C. § 1915(d). The court of appeals for the eighth circuit reversed and remanded.

The appeals court held that Cokeley had stated a valid legal claim in his complaint. A successful habeas petitioner, like a pretrial detainee, has not been convicted of a crime and is being held in custody pending trial to determine guilt. "Pursuant to the due process provisions of the Fourteenth Amendment, a pretrial detainee may not be punished prior to a determination of guilt in accordance with due process." *Bell v. Wolfish*, 441 US 520, 99 S. Ct. 1861 (1979). In *Martinez v. Turner*, 977 F.2d 421 (8th Cir. 1992) the appeals court held that "... requiring a pretrial detainee to work or be placed in administrative segregation is punishment."

"Cokeley alleges that, after his habeas petition was granted but while he was still imprisoned, he was punished when he refused an order to work. Cokeley thus has raised a novel claim with an arguable legal basis that the due process clause protects a successful habeas petitioner from punishment as it does a pretrial detainee. The district court abused its discretion in dismissing this claim." The appeals court remanded the claim back to the lower court and also instructed the district court to consider the court access claim as well. See: *Cokeley v. Endell*, 27 F.3d 331 (8th Cir. 1994).

Evidence Must Support Disciplinary Charge

Indiana is unique in that it does not provide any state court remedy for prisoners who lose good time in prison disciplinary hearings. As a result, Indiana state prisoners seeking the restoration of lost good time or expungement of infractions must file directly in federal court pursuant to 28 U.S.C. § 2254, the federal habeas corpus statute.

Steven Huffman, a Westville Correctional Center prisoner, was observed in a staff bathroom with a female prison guard. Prison investigators obtained the employee's home phone records which showed she had received numerous calls from Huffman over a two week period. As a result of this investigation Huffman was infraacted for "trafficking" by giving

messages to Huffman over the phone and in person at the prison (i.e. speaking to her). Huffman was found guilty of the charges and an unspecified punishment was imposed. The case does not state what action, if any, was taken against the guard.

Indiana Code Section 35-44-3-9 defines trafficking as taking an article to or from a prisoner in a penal facility without the warden's authorization. In granting Huffman's petition for habeas corpus the district court held that the infraction report did not list any facts to indicate that any article had been taken in or out of the Westville prison, thus, no evidence supported the finding of guilt. While Huffman may be guilty of some offense, he was not guilty of "trafficking" and the court granted his petition for habeas corpus.

In doing so, the court gives a brief analysis of the "some evidence" standard applied to the judicial review of prison disciplinary hearings in the seventh circuit. The court also referred to several Indiana state cases involving criminal convictions for trafficking items into prisons. See: *Huffman v. McBride*, 853 F. Supp 1095 (ND IN 1994).

U.S. S. Ct. to Hear Prison & Parole Cases

The 1994-95 term of the United States Supreme Court began on October 3, 1994. Among the cases scheduled for hearing by the Supreme Court are two cases previously reported in *PLN* which will have wide ranging effect.

California Department of Corrections v. Morales, 93-1462, is the state's appeal from the ninth circuit ruling at 16 F.3d 1001 [See: *July, 1994, PLN*] in favor of Morales. Morales is a California state prisoner who was convicted of murder for the second time in 1980. At the time of his second conviction California law provided for annual parole hearings once a prisoner was eligible. This law was later amended to allow for parole hearings every three years. Morales went to his first parole hearing in 1989 and was scheduled for another one in 1992. He filed a habeas corpus petition challenging the change in parole hearings as a violation of the Ex Post Facto clause of the

constitution. The Ex Post Facto clause prohibits increasing the penalty or punishment of crimes after they were committed or criminalizing conduct after the fact.

The ninth circuit court of appeals agreed with Morales and granted his writ of habeas corpus, stating that he was entitled to annual parole hearings. As previously reported in *PLN*, there is a deep conflict in the ninth circuit on this issue. In *Powell v. Ducharme*, 998 F.2d 710 (9th Cir. 1993), the appeals court held that a sentencing scheme in Washington effectively extended the parole eligibility hearings of several hundred life sentenced prisoners but did not violate the Ex Post Facto clause. However, in *Flemming v. Oregon Bd. of Parole*, 998 F.2d 721 (9th Cir. 1993), the court ruled just the opposite. Holding that a change in the frequency of Oregon parole hearings was an Ex Post Facto violation. The Supreme Court decision should eliminate this split within the ninth circuit. This decision will also have an effect on the still pending *Powell* litigation [See: *September, 1994, PLN*]. The sole issue presented for review by the court is: "Does retrospective reduction in frequency of parole eligibility hearings violate prohibition against ex post facto laws contained in Article I, Section 9, Clause 3 and Article I, section 10 of the U.S. Constitution?"

An interesting side note, in its 1993-94 term the supreme court agreed to hear an appeal on the Ex Post Facto issue in a fourth circuit case, *Roller v. Cavanaugh*. After hearing oral argument, the case was removed from the docket and no ruling on the merits was given by the Supreme Court because the South Carolina legislature changed the law.

The sole prison case on the supreme court docket so far (usually the court hears one or two prison cases per term) is *Rowe v. DeBruyn*, 94-249. The lower court ruling, 17 F.3d 1047 (7th Cir. 1994), held that prisoners have no right to self defense. The case involves an Indiana state prisoner who was infraacted and punished by prison officials for fighting off an attempted rape. [See: *PLN, July, 1994*]. The question presented for review by the supreme court is: "Does prisoner being attacked and raped have fundamental right, protected by the Due Process Clause, to defend himself?"



BOP Phone Litigation Update

In the March, 1994, issue of *PLN* we reported on *Washington et al. v. Reno, et al.*, a lawsuit filed by women prisoners at FCI Lexington challenging the federal Bureau of Prisons (BOP) newly implemented Inmate Telephone System (ITS). [Editor's Note: For a full account of the ITS operations and the issues raised in the suit and the preliminary rulings please refer to the March, 1994, issue.] The suit was initially filed in May, 1993, and the court appointed counsel to represent the plaintiffs in the action. In the amended complaint, the plaintiffs challenge the ITS on grounds of free speech, due process, eighth amendment, equal protection and constitutional taxing powers. They also challenged the BOP's violation of its own administrative rules regarding the ability of prisoners to place collect calls and the BOP's failure to comply with the Administrative Procedures Act (APA). The BOP's "Request for Telephone Privilege" was challenged under the Privacy Act as unduly intrusive. Also challenged was the BOP's attempt to condition phone use upon participation in the Inmate Financial Responsibility Program (IFRP), i.e. payment of fines and such. The suit attacked the use of profits from the Commissary/Inmate Welfare Fund, a statutory trust, to purchase and operate the ITS when the welfare fund is supposed to be used as a trust for the benefit of prisoners, not for the BOP. They also challenged the ITS under the Federal Communications Act of 1934.

After a hearing on October 10, 1993, the district court in Kentucky issued a preliminary injunction in favor of the plaintiffs on October 13, 1994. Among the issues covered by the injunction were: 1) The BOP could not install its new ITS without providing an equivalent collect call system that used to exist prior to the ITS; 2) The BOP must make all facilities that already had the ITS (40 out of 80) provide prisoners with a collect call capability that formerly existed within a reasonable time period; 3) The BOP was barred from conditioning prisoner's phone use on their IFRP participation; 4) The BOP was barred from limiting the types of persons (i.e. media, courts, elected officials, etc.) prisoners could list on their phone list, except they could limit

the number of persons to no less than 20; 5) The BOP was barred from spending funds from the Commissary/Inmate Welfare Fund Trust to pay for the ITS except that prisoners could be required to pay for their ITS placed calls, and those funds could be reimbursed paid from the trust.

On November 18, 1993, the court certified the suit as a nationwide class action suit on behalf of all federal prisoners throughout the United States. The district court declined to stay its order of the preliminary injunction while the government appealed. The Sixth Circuit court of appeals granted a temporary partial stay of the PI pending hearing the appeal on the PI. The partial stay allowed the BOP to continue operating the ITS in the institutions that already had it as of October 13, 1993, (about 40) as if there were no PI in place. The PI remains in full force and effect for all the other institutions not having the ITS in operation as of October 13, 1993. The sixth circuit placed the appeal of the PI on a "fast track" and ordered prompt briefing. Oral argument before the appeals court was held on May 12, 1994. As we go to press they have just rendered a decision in the case, which we will report in full in an upcoming issue.

During the pendency of the litigation the BOP has made numerous changes to the manner in which it operates its ITS, many of which respond to the claims made in the lawsuit. In its briefs to the appeals court the BOP claimed that elected officials, members of the court and media could be listed on prisoner's ITS phone lists. The plaintiff's attorney called the BOP's briefs incorrect and misleading on this point and the BOP submitted supplemental filings to the appeals court correcting its briefs. On or about March 15, 1994, the BOP issued a nationwide memorandum to all prisons requiring them not to exclude elected officials and members of the media or courts from prisoners' ITS phone lists. At about the same time the BOP issued a nationwide directive to all prisons not to exclude prisoners from ITS phone use based solely on their "IFRP-refuse" status. This was partial victory for the plaintiffs.

On April 4, 1994, the BOP issued its new "final rule" regarding the ITS, see: 59 Fed. Reg. 15812-25. After being ordered by the district court to leave its "comment" period open for input from

prisoners and the public, with regards to the BOP's "proposed rule" regarding the ITS, comments were received from prisoners, news organizations, prisoner support groups, class counsel and interested citizens across the country. The BOP's new "rule" responds to many of the comments received and capitulates on virtually all constitutional, indigency and fairness issues raised by the plaintiff's class in the lawsuit and the "comments" received from prisoners.

The new "rule" abolishes the Request for Telephone Privilege form that was so intrusive of potential call recipients' privacy. It also eliminates any limitation on the types of persons whom prisoners may ordinarily select for their lists and increases the maximum from 20 to 30 phone numbers. The rule permits the BOP to send a notice to potential call recipients, and unless the potential call recipient notifies the BOP that he/she does not want to receive phone calls, the person will be included on the prisoner's phone list. The BOP reserves to itself the right to exclude certain persons from being phoned by prisoners for "security" reasons. But, if the BOP exercises its exclusion it will now have to provide the call-recipient and the prisoner with a form of administrative due process (notice and opportunity to be heard, with appeal rights).

The rule alleviates families' concerns that if they have to send money to a prisoner for phone calls, the money might actually have to go towards payment of the prisoners IFRP obligations, i.e. fines, restitution, etc. The new rule allows up to \$50.00 a month to be exempted from IFRP calculation. The new rule will still tie ITS phone use to a prisoner's IFRP participation, but this latter tying provision does not take effect until January 3, 1995. The \$50.00 exemption does provide prisoners some measure of being able to receive family financial help for ITS phone calls without contributing that support to the prisoner's IFRP obligations. Nonetheless, prisoner earnings will be counted towards IFRP refusal status and will be a condition for ITS phone use after January 3, 1995. The litigation will continue to challenge this aspect of the ITS.

The rule provides for a limited definition of "indigency," i.e. no money on the

prisoner's account in excess of \$6.00 per month. If the prisoner meets this level of indigency, they will be entitled to one collect call per month. This too is only a partial victory and will continue to be the subject of litigation.

The assessment of Douglas McSwain, the class counsel in this case, is that the new ITS rules do not satisfy the plaintiff's demands in this case but they do represent a substantial partial victory at this point. Regardless of the new "rule" counsel is still arguing at both the district and appellate court level that the PI should be left in place and that the sixth circuit's temporary stay of the PI should be lifted.

Mr. McSwain has filed proposed amendments to the amended complaint in the district court to add a count attacking the BOP's new "rule." The basis for that claim is the rule is arbitrary in limiting indigent prisoners to only one collect call per month. The primary focus of the amendment to the pending complaint is that the BOP is implementing and operating the ITS out of the Commissary/Inmate Welfare Trust fund. This is being challenged as violating the terms of the trust. The plaintiffs have also attacked the rate making processes and methodologies of the BOP in setting ITS phone rates, in particular, the failure to publish the proposed rates for notice and comment. Also challenged is the failure to publish the rates as tariffs under the Federal Communications Act of 1934. If the plaintiffs succeed on these claims, the BOP will have to stop operating the ITS altogether or it will have to offer prisoners both a collect call and direct dial system call system, with the collect call capability comparable to what existed before the ITS.

The basis for the continuing attack is two fold. First, the Commissary Inmate Welfare Fund may only be properly spent for prisoners' benefit, and a restricted collect call capability under the ITS is not for the prisoners' exclusive benefit but rather for the BOP's benefit. Secondly, the BOP's ITS scheme improperly attempts to set the ITS direct dial phone rates in violation of constitutional and statutory due process, the constitution's taxing power, certain statutes pertaining to fees and charges for government services and the Communications Act of 1934.

Mr. McSwain predicts that the current appeal will focus on the Commissary/Inmate Welfare Fund trust issue and the PI's requirement of a dual collect and

direct dial calling system. The BOP's new "rule" has capitulated on a number of constitutional issues and therefore, the appeals court will most likely focus on the Commissary Fund question. *PLN* will continue to keep readers posted of developments in the case as they occur. To date, this is the most significant litigation challenging prison phone systems anywhere in the country and the appeals court ruling may have a significant impact on pending and future litigation on this issue.

MA DOC Uses New Phone System

By Paul Wright

As part of the nationwide trend towards more restrictive and more expensive prison phone systems, the Massachusetts DOC signed a contract with NYNEX on January 27, 1994, for the provision of phone services to Massachusetts prisons. The new phone system includes monitoring and taping of all calls; the pre-approval by the prison warden of all numbers to be called; the listing, by name, of each person the prisoner will call; the limiting of total personal numbers to ten per prisoner; limiting of all attorney numbers to five. All calls are made by a recorded voice announcing that the call is coming from a prison. The length of calls is limited and the new system disallows use of third party and call waiting services. Prisoners seeking to change or add a number to their approved list (say a relative moves) can only do so once every three months.

In order to use the system prisoners must accept a Personal Identification Number (PINS). Massachusetts prisoners have actively resisted the imposition of the new phone system., which went on line in April, 1994. At Bay State, a prison housing mainly long term prisoners, of 266 prisoners only 17 took PINS and within two months after that only 6 had made calls. At other prisons, such as Shirley and Walpole, where some 10-20% of prisoners took PINS there has been little phone use. So far there has been no information as to what effect the phone boycott is having on the DOC.

In the April, 1994, issue of *PLN*, I reported the successful phone boycott by Louisiana prisoners protesting the increase in phone rates at the prison. At the height of the Louisiana boycott, calls

were down to about 500-600 a day from over 2,000 a day before the boycott. The loss in revenues forced the phone contractor, Global-Link, to reduce its rates. There are however important differences. In Louisiana the prisoners' position had been supported by that state's utilities commission and unhappy prison officials who maintained Global Link was not complying with the contract it had signed, and concerned only rates. In Massachusetts the new phone policy is part of a tightening noose on prisoners' collective neck imposed by reactionary governor William Weld who has vowed to make that state's prisons like "a tour through the nine circles of hell." (See *PLN*, August, 1994). Illustrative of that was the fact that the MA DOC signed the phone contract with NYNEX on January 27, 1994, and held the required public hearings on the matter March 2, 1994. The DOC admits that the "hearings" are only for promulgation purposes and that people who testify at such hearings have to understand that they are only for "public ventings" rather than anything of substance. So much for "democracy."

In addition to the boycott by prisoners, Massachusetts Legal Correctional services is in the process of filing suit challenging several aspects of the new phone system. According to MCLS counsel, Jim Pigeon, the main focus of the litigation will be on the inclusion of monitoring and taping provisions in the MA DOC rules on prisoner phone use. These provisions violate the Massachusetts wiretapping statute, MGL Chapter 272, § 9SC. While the DOC argues that the prisoners' acceptance of a PIN constitutes "consent" to the monitoring, MCLS's position is that such "consent" is not valid because no choice is given. Of particular concern is the limiting effect this will have on prisoners' ability to communicate with the outside, especially the media, attorneys, civil rights groups, etc. Once the litigation is filed we will report that as well.

Nationally the attack on prisoners' phone access is taking several tacts. [See: *BOP Phone Litigation Update on page 10*] First, are excessive rates, which are usually in excess of filed rates and thus illegal, which allows kickbacks to the DOCs. Second, restricting the number of people that can be called or communicated with, especially the media and civil rights groups. This allows a greater control on information and keeps the outside from knowing what is going on inside.

Third, chilling prisoners' speech as to what they actually say by recording and monitoring the calls. The net effect of these practices is to attempt to further isolate and alienate prisoners, cut them off from society and their families as well as keep society ignorant of prison conditions. The excessive phone rates serve as a highly regressive tax on those least able to afford it: prisoner's families. We have regularly reported on phone issues in the past and will do so in the future. Please keep us posted of any local developments in your state. The April, 1993, issue of *PLN* had an article by myself outlining the relevant case law on phone litigation. Copies are still available, send \$1.00 to cover copying and postage and specify the issue.

Asset Forfeiture is Dysfunctional Policy

Two sociologists received the 1994 Academy of Criminal Justice Sciences Award for their undercover study and critical analysis of asset forfeiture's impact on police procedure. *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, by Mitchell Miller, Tennessee State University, and Lance H. Selva, Middle Tennessee State University, a scholarly examination of drug enforcement's use of asset forfeiture, will appear in a forthcoming issue of *Justice Quarterly*.

The study is based on twelve months of covert observation from within narcotics enforcement agencies by one of the authors who assumed the role of confidential informant in undercover drug investigations. The researchers assessed the effect of forfeiture on police conduct and case selection. Their findings "suggest asset forfeiture is a dysfunctional policy that has, in implementation, strayed from its original intent.... Forfeiture programs, while serving to generate income, prompt drug enforcement to serve functions that are inherently contradictory and often at odds with the demands of justice."

The undercover researcher observed agencies abandon investigations of suspects they knew were trafficking large amounts of contraband simply because the case was not profitable. Agents routinely targeted low level dealers rather

than big traffickers, who are better able to insulate themselves and their assets from reverse sting operations. The report states: "Efficiency is measured by the amount of money seized rather than impact on drug trafficking."

A reverse sting operation, where the officer becomes the seller who encourages the suspect to commit a crime, "was the preferred strategy of every agency and department with which the researcher was associated because it allowed agents to gauge potential profit prior to investing a great deal of time and effort." More importantly, the narcotics units studied preferred seizing cash intended for purchase of drugs supplied by the police, rather than confiscating drugs already on the street. When asked why a search warrant would not be served on a suspect known to have resale quantities of contraband, one officer responded: "Because that would just give us a bunch of dope and the hassle of having to book him (the suspect). We've got all the dope we need in the property room, just stick to rounding up cases with big money and stay away from warrants."

In one case an agency instructed the researcher to observe the suspect's daily transactions reselling a large shipment of cocaine so that officers could postpone making the bust until after the majority of the drug shipment was converted to cash. This case was one of many in which the goal was profit rather than reducing the supply of drugs reaching the street.

The researchers also found that, due to competition for revenues between agencies in adjoining or overlapping jurisdictions, "operations often disintegrated due to a general lack of interagency cooperation, leaving numerous suspects at large."

The report concludes: "The tactics required to generate seizures (of cash) on a regular basis too often conflict with the ideals of protecting and serving the public. A situation has developed that allows narcotics supervisors to justifiably choose between strategies that produce revenue and those that acknowledge the demands of justice. Recent Supreme Court decisions have done little to alter the present approach of forfeiture programs.... These restrictions [arising from *Austin v. U. S.* and *U. S. v. Buena Vista*] will not necessarily limit the scope and victimization and intrusion; they may even worsen the present condition. The principle of proportionality, for example,

confines law enforcement to less property per seizure, but may invite more frequent application of the tactic so as to maintain revenue levels already fixed in agency budgets.

"In certain cases, asset forfeiture has proved to be a valuable enforcement tool, however, this potential benefit must be weighed against dysfunctional consequences.... The innate contradictions of asset seizure practices have surfaced as highly controversial civil liberties violations that have increasingly eroded our sense of fairness and have engendered a frame of mind among drug enforcers of subordinating justice to profit... The inability of enforcers to effectively combat the pervasive illicit drug market provides no justification for rationalizing legal mechanisms whereby law enforcement agencies share the wealth of drug trafficking under the guise of 'service' to society.

"Asset forfeiture has given drug enforcers a powerful incentive to maintain and manage economic mechanisms that allow the illegal drug market to continue a market in which the drug enforcers and drug traffickers become symbiotic beneficiaries of the 'War on Drugs'."

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WI Removes Weights and Tennis Courts

Wisconsin's hard-line Republican Governor Tommy Thompson, apparently concerned about his upcoming re-election bid, has ordered all weights and tennis courts removed from the Wisconsin prison system by October 1, 1994. Wisconsin prison officials were in the process of conducting an inventory of weights and tennis equipment after which the weights and tennis equipment would be declared surplus and disposed of.

Prison officials claimed that the tennis courts were expensive to maintain and could be converted to more useful space. However, most of the "tennis courts" are simply nets and stripes on blacktop parking lots or other unused prison space.

In a letter to prison director Michael Sullivan, Governor Thompson ordered the prison boss to convene a task force "to increase employment for prisoners, to link prisoner jobs to jobs in the community after release and to recommend changes in laws that inhibit these efforts." Thompson, who has gained national publicity for his aggressive attacks on welfare recipients, said "there is no free lunch in Wisconsin prisons" and that it was time to cut prisoner idleness and expand their workload.

DOJ Releases ADA Advisory Report

In 1990, Congress passed the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131-12134, which prohibits discrimination against the disabled by state and local government entities. The ADA applies to criminal justice agencies, including prisons and jails. The Department of Justice (DOJ) is one of eight federal agencies charged with enforcing the ADA and has issued its report: *The Americans With Disabilities Act and Criminal Justice: Providing Inmate Services*, which gives an excellent, comprehensive overview of what accommodations to the disabled must be provided by state agencies. The ADA allows citizens to privately sue agencies for money damages and injunctive relief in order to ensure compliance with the ADA. As *PLN* has reported in the past, this private right of action applies to prisoners and jail detainees as well. See: *Noland v. Wheatley*, 835 F. Supp. 476 (ND IN 1993).

The DOJ report gives a legal overview of the ADA's requirements as applied to prison programs and advice aimed mainly at prison administrators on how to comply with the ADA and thus avoid violating its provisions. This includes identifying prisoners with disabilities during intake classification and ensuring that an evaluation of existing prison programs is made, then modified to comply with the ADA.

The main areas covered are developing policies and procedures, architectural

barriers and communications. The ADA does not require prisons to retrofit all existing facilities to a new ADA standard. What it does require is a prison operate each service, program, or activity that it offers so that viewed in its entirety the service, program or activity is readily accessible to and usable by, disabled individuals. This standard, known as "program access," applies to all new construction and alterations to existing structures. The report lists alternative means of ensuring program access. Prisons must ensure that its communications with the disabled (i.e. sight or hearing impaired) are as effective as those with the non-disabled. This may include sign language interpreters, qualified readers, etc. The report emphasizes the need for prison administrators to develop written policies addressing these matters before the need for them actually arises.

The report contains many commonly asked questions about the ADA and how to ensure its compliance. The report notes that the ADA also applies to prison employees, attorneys, clergy and visitors to the prison (i.e. family members) who may have a disability. Anyone interested in this issue should ask for a free copy from: US Department of Justice, Office of Justice Programs, National Institute of Justice, Washington D.C. 20531.

Hazardous Waste Found in WI Prison

Since 1993 the Wisconsin Department of Corrections has been the subject of several scathing investigations by that state's Department of Natural Resources (DNR). The investigations have made several alarming discoveries, concluding that the DOC is failing to keep track of and properly dispose of hazardous industrial and agricultural waste.

An unlicensed dump at the Oregon prison farm, south of Madison, was discovered in the aftermath of a June, 1993, tornado that swept through the area. When DNR staff investigated they discovered pesticides, paint, tires, barrels containing unidentified liquid waste, empty fuel oil tanks and other refuse, according to Mike Degan, DNR hazardous waste unit leader for that district. The DOC, when questioned about the dump, said they were not aware of the dump site and blamed it on prisoners. [See: *Dec.*

1993, *PLN*.] In July, 1993, Dodge County Court Judge Joseph Schultz ordered the DOC and Badger State Industries (the DOC run industrial company) to write an environmental clean up plan because the prison at Waupun had earlier been found in violation of state hazardous waste storage and disposal laws. The court said the plan was needed "to avoid violations of environmental laws" and gave the DOC a December 31, 1993, deadline by which to comply. The DOC ignored the deadline. David Whitcomb, chief legal counsel for the DOC, stated that no one had been assigned to do the job. He claimed a breakdown in communications, but this time did not blame it on prisoners.

The environmental problems at Waupun are related to improperly stored and disposed of chemical solvents, used at the prison's license plate, furniture and sign production facilities, which have contaminated the ground water beneath the prison. Since 1990 the DOC has spent \$309,280 to remove six leaking hazardous waste storage tanks and study the extent of ground water contamination at the prison.

Dave Edwards, a DNR hazardous waste specialist, said that chemical waste leaking from the prison may be responsible for contaminating Waupun's municipal wells. He said that municipal wells could still be used for drinking because the solvent concentrations are very low. However, he said that at the Waupun prison, solvent levels in monitoring wells far exceed safe levels. The DNR's concern doesn't appear to be that prisoners at Waupun have safe drinking water but only to avoid further contamination of the municipal wells.

Judge Schultz ordered the DOC to determine whether there is hazardous waste contamination at any of its other 31 prisons, farms and smaller facilities. Each facility was asked to complete a questionnaire detailing what it did with its hazardous waste. Degan and other DNR investigators have expressed doubts about the DOC's ability to police itself, based on its past performance.

At least one Waupun prisoner, Vances Smith, has filed suit over the prison's water contamination due to the large numbers of prisoners becoming ill or showing other symptoms of chemical poisoning. Despite newspaper articles relating the above facts, the prison official defendants denied that anything was

Hazardous Waste (cont.)

wrong with the prison's water supply. (They did admit that the prison's cellways were lined with asbestos but claimed it was in good repair and did not pose a health hazard. Smith notes that the only reason he became aware of the asbestos was because he could see it hanging off the pipes.) In discovery Smith learned that the DNR had sued the DOC over the illegal dumping. He obtained a copy of a stipulation agreement between the DNR and the DOC whereby the DOC admitted the facts of the complaint; agreed to pay \$55,000 and agreed to clean up the waste and ground water. The stipulated agreement lists the various chemical solvents the water is contaminated with and the amounts in which the chemicals are present. Smith's litigation is still in court.

Killer Workplace

On June 15, 1994, a conference on workplace violence was held at Boeing's Renton campus near Seattle, WA. The topic was growing workplace violence, defined as workers striking out rather than companies maiming, poisoning, exploiting workers and the community. According to Dr. Kevin Flynn, a consultant to Fortune 500 companies, homicide is the No. 1 cause of death in work force for women and the No. 3 cause for men. He said it accounts for 12 percent of all work related deaths and 42 percent of female deaths on the job. In 1993, 110,000 incidents of workplace violence were reported in the US. An estimated 750 people were killed in the workplace, according to Flynn.

Six weeks later the Justice Department issued a report on this topic that differs from Flynn's numbers. On July 25, 1994, the Department of Justice's statistics bureau issued its first ever report on "violence" in the workplace (not that done by employers of course). According to the report, almost 1 million violent crimes occur in the workplace each year. Ten percent of such crimes involve offenders armed with handguns. Based on national household surveys the report found that men are more likely to be the victims of violent crime at work and more likely to be attacked by a stranger. While women were as likely as men to victims of theft

and more likely to be attacked by someone they knew while at work.

Flynn suggested the hiring of more internal police and greater "security" forces. It seems obvious that the "causes" of workplace violence by workers are due to increased exploitation (i. e. increase of hours worked per year coupled with a decrease in pay), lack of job security caused by massive downsizing and shifting of jobs to third world countries, work speed ups, etc. No conferences are being held to discuss employers that kill their workers with toxic chemicals and unsafe workplaces, that dump hazardous wastes into communities, market unsafe products, and otherwise commit murder in a manner less dramatic than gunfire.

Overcrowding Leads to Pneumonia

On September 8, 1994, the *New England Journal of Medicine* published the report of an investigation conducted by the U. S. Centers for Disease Control and Prevention into the outbreak of a deadly form of pneumonia in the Harris County (Houston) jail in Texas in 1989. The outbreak was caused by a bacteria known as streptococcus pneumoniae which causes pneumonia or more serious blood infections. This outbreak was the first in what has become a series of pneumonia infections in crowded places, including prisons, jails, military bases, day care centers and nursing homes.

Dr. Robert Breiman, whose team investigated the Harris County jail outbreak, said "We think this was a sentinel in the reemergence of that disease." The study concluded that the bacteria was fostered by the cramped, airless conditions that gave each jail prisoners less than 34 square feet of living space. The 13 story jail was designed to hold 3,500 prisoners but at the time of the outbreak held 6,700, with half sleeping on the floor on mattresses. The outbreak affected 46 prisoners in one month, killing two. Investigators discovered that no prisoners with more than 80 square feet of living space were affected. They also discovered that the jail ventilation system delivered 6 cubic feet of outside air per person per minute. The recommended level is 20 cubic feet per person per minute. Likewise, current engineering standards suggest giving

prisoners at least 50 square feet of living space.

The report concluded that the outbreak was caused by overcrowding, poor air circulation and the susceptibility of the prisoners to actually being infected by the bacteria due to health problems caused by AIDS and drug abuse. "My gut feeling is the thing that played the greatest role was overcrowding, but it was a combination of all three," said Dr. Breiman.

Harris county has opened a new jail since the outbreak occurred. The old jail, where the outbreak occurred, now holds 3,750 prisoners. A new ventilation system has been designed but not installed yet.

Cooling Towers Spread Legionnaire's

The Federal Centers for Disease Control (CDC) has issued a report stating that cooling towers holding contaminated community water can lead to serious outbreaks of Legionnaire's disease, a pneumonia like illness that can be fatal. The bacteria causing the disease are spread by water or air conditioning systems. More than 1,000 cases a year are reported to the CDC but health officials say most cases are not diagnosed and that about 25,000 people a year fall ill from it.

One outbreak in a Michigan state prison earlier this year affected 17 people, killing one. Investigating that case and several others in civilian communities, health officials concluded that cooling towers were the source of the contamination. Cooling towers had been previously identified as possible transmission routes but this is the first time they were identified with actual outbreaks of Legionnaire's disease. The CDC is now developing guidelines for the prevention of Legionnaire's disease, including improved maintenance of cooling towers. Many prisons, especially those in rural areas, are supplied by water cooling towers.

MI Parole Consent Decree Vacated

In 1977 Michigan state prisoners filed a class action suit challenging the procedures by which they were granted or denied parole. In 1981 the US district court in Michigan entered a consent decree set-

tling a lawsuit between the Michigan state Parole Board and Michigan state prisoners. The decree required the state to follow detailed procedures for the conduct of parole hearings and rehearings, to publish parole board rules, establish and follow parole rules, allow prisoner access to parole files and to staff parole units. After entering into the decree the state never fully complied with its contents and repeatedly motioned the district court to vacate the consent decree. The district court refused to do so and entered an injunction ordering the defendants to comply with the decree and also appointed an independent monitor to ensure compliance. The parole board appealed the rulings. After seventeen years of litigation and several trips through the courts the sixth circuit court of appeals, en banc, reversed and remanded the case to the lower court with instructions to dissolve the decree.

In its ruling the appeals court gives a brief analysis of the standard of review to be applied in reviewing and modifying consent decrees entered into between litigants. Consent decrees are contracts entered into between the parties which are, in theory at least, judicially enforceable. In *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992), the Supreme court set out the doctrine for modifying consent decrees which allows modification if there has been a substantial change in conditions or applicable law since the decree was entered.

Using this analysis the court concluded that prison rules governing parole do not create a federal due process liberty interest "and that in the present case the legal theory and analysis upon which the consent decree was formulated was erroneous." Thus, while the Michigan parole board might be required to follow their own rules as a matter of state law, there was no basis to make them follow their own rules as a matter of federal law.

The prisoners argued that by vacating the decree at this point they would be prejudiced because in agreeing to the decree they had abandoned several claims raised in the initial decree. The court rejected this argument because "No basis in federal law exists for the injunctive relief imposed in this case. That Michigan parole authorities 'arbitrarily' failed to follow their own state procedural standards could constitute a violation of state law but not federal law." "Here, decisional law has

changed so that the enjoined behavior, which once might have been a violation of federal law, is no longer a matter of federal law at all." See: *Sweeton v. Brown*, 27 F.3d 1162 (5th Cir. 1994) (*en banc*).

Lawyers Deny Inmate Discovery Pending Motion to Dismiss in Federal Court

by Allan Parmelee

In all the lawsuits brought by federal prisoners against prison staff, the U.S. Attorney who defends them will usually file a Motion to Dismiss or in the Alternative for Summary Judgement in favor of the defendants. Plaintiffs should respond quickly and firmly requesting the court to review the matter or appeal.

A prisoner files his complaint, then attempts discovery proceedings. The government then files their response, and a motion to dismiss. If you pursue your discovery proceedings, they will file a motion to stay discovery waiting for the judge to rule on their motion to dismiss.

The usual defense by the government says; 1. Plaintiff has failed to state a claim for violation of his constitutional rights. 2. The defendants are entitled to qualified immunity. 3. In the alternative, the defendants are entitled to summary judgement because there are no disputed issues of material fact and they are entitled to a judgement as a matter of law. 4. Plaintiff has failed to state a claim for which relief can be granted.

Of course, this is a boilerplate response and you should expect them to try to avoid responding to your discovery request. But they do it under what they call "protection of government cover."

Federal Rules of Civil Procedure, Rule 26(c), allows for this often abused procedure.

Although the discovery process contemplates minimal judicial intervention, there are many instances where judicial intervention is sought and obtained, whether for protective orders under Rule 26(c), to compel discovery under Rules 37(d) and 45, or to compel answers to questions under Rule 37. In addition, the court may enter orders governing discovery under the Rule 26(f) discovery plan procedure. If a discovery order is issued by the court, this risks irreparable injury to your case. What is your remedy?

As a general proposition, discovery orders are not appealable; most discovery orders are interlocutory (not finally deci-

sive), and are not final determinations under 28 U.S.C. § 1291. Indeed, nothing in the Rules or in the statutes provides for any appeal of discovery orders. As with most rules, there are exceptions. If an Order of the district court fits the following criteria, an appeal may be allowed: a) The order has a substantial impact on an outcome of the merits of the litigation. b) The order may cause a party to suffer substantial prejudice or irrevocable injury, e.g., an order requiring a party to reveal what they observed, before they forget, moves away, leave the country or reveal protected exempt secrets. See Appealability of Order Pertaining to Pretrial Examination, Discovery, Interrogatories, Production of Books and Papers, or the Like, 37 A.L.R. 2d 586 (1954).

The courts direction you should keep in mind in all litigation is APPEAL and PURPOSE. A final decision on which federal appellate jurisdiction depends generally is one that ends litigation on the merits and leaves nothing for the court to do but execute the judgement. See: *Firestone Tire & Rubber Co v Livesay*, 449 US 368, 101 Sct 669, 66 LE2d 571 (1981); *Cooper & Lybrand v Livesay*, 437 US 463, 98 S. Ct. 2454, 57 LE2d 351 (1978); *Catlin v. United States*, 324 US 229, 65 Sct 631, 89 LE 911 (1945).

There two principal avenues for an appeal but both are rarely granted: 1. Petition for writ of mandamus or prohibition 2. A certification under 28 U.S.C. § 1292(b) by the trial judge that the order involves a controlling question of law about which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation. See also: Annotation, Appealability of Discovery Orders as "Final" Decisions under 28 U.S.C. § 1291., 36 A.L.R. Fed. 763 (1978). In addition, some orders are deemed final for appeal because they did not affect the ongoing litigation, e.g., an award of fees under Rule 37(b)(2).

No Immunity for Beating

Thomas Munz was an Iowa state prisoner called to testify in federal court. Munz was taken to the court by federal marshals. En route to the court, while bound hand and foot, Munz became violent and vandalized the interior of the marshal's car. When Munz and his escort arrived at the Linn County jail, where he would be held pending his testimony in court, he was passive and cooperative with the marshals. Munz claimed that he was pulled out of the car, slammed against a wall, taken to a padded cell where marshals and jailers proceeded to beat, kick and stomp him. Throughout the beating Munz was handcuffed, with leg restraints and a belly chain. Munz filed suit claiming that the beating violated his eighth amendment right to remain free of cruel and unusual punishment.

The marshals sought summary judgment on various grounds, which the district court denied. The court specifically held that the marshals were not entitled to qualified immunity because a reasonable Marshall would have known that beating a bound prisoner in a cell was neither reasonable nor lawful. The defendants appealed the lower court denial of their summary judgment motion and the court of appeals for the eighth circuit denied their appeal.

The first question the court resolved was whether Munz was a prisoner or a detainee for purposes of what constitutional standard applied to his claims. (The eighth amendment applies only to convicted prisoners. The fourth amendment prohibits unreasonable uses of force against detainees not convicted of any crimes. While similar standards, detainees receive greater constitutional protection.) The court concluded Munz was a prisoner protected by the eighth amendment because only his location, not his status had changed.

The defendants denied beating Munz and argued that his claims of a violent beating were implausible in light of uncontradicted medical testimony that, at most, he suffered rib contusions. The court held that, in his verified complaint, Munz has produced sufficient evidence to create genuine issue of material fact, precluding summary judgment. Applying the core judicial inquiry from *Hudson v.*

McMillian, 1 12 S. Ct. 995 (1992), of the need for the application of force, the relationship between the need and the amount of force used and the extent of the injury inflicted, the court held Munz had produced sufficient evidence allowing a jury to find in his favor at trial. A jury could conclude that beating a handcuffed prisoner on the floor of a padded cell was the "sadistic and malicious" application of force designed to harm rather than advance any legitimate penological goal.

The court gave a brief overview of the applicable law governing beatings of prisoners, and held that prisoners have a clearly established right to be free from cruel and unusual punishment. Moreover, Munz's claims fell squarely within that prohibition so that if he prevailed at trial the marshals would not be immune from money damages. See: *Munz v. Michael*, 28 F.3d 795 (8th Cir. 1994).

WA Digital Probe Suits Barred

In 1984 the Washington state DOC opened two control units and initiated a policy whereby all prisoners transferred to the Intensive Management Units (IMU) were subjected to a digital rectal probe, or digital rape, upon entry. The "searches" were conducted on a blanket basis with no individual suspicion being required. Thousands of such "searches" were conducted and no contraband was recovered. After extensive litigation the practice was found unconstitutional, see: *Wetmore v. Gardner*, 735 F. Supp 974 (ED WA 1990), but on appeal the defendants were awarded qualified immunity from personal liability and thus no damages were awarded, see: *Hemphill v. Kincheloe*, 987 F.2d 589 (9th Cir. 1993). The ruling in *Hemphill* affected the damage claims of more than 100 Washington prisoners who had been subjected to the "searches" and who filed suit seeking money damages. Their claims were all consolidated into *Hemphill* for the purposes of addressing the qualified immunity question.

David Castillo, a Washington state prisoner, filed suit seeking only money damages for a digital rectal search conducted pursuant to the unconstitutional blanket search policy. The district court granted summary judgment to defendants Larry Kincheloe, the former prison war-

den, and Booth Gardner, the former governor, on collateral estoppel grounds. The court held that the ruling in *Hemphill* applies to all suits seeking damages for "searches" conducted under the since defunct and unconstitutional search policy. (This ruling does not apply to any cavity searches conducted since then.) Thus, even though Castillo was not a plaintiff in *Hemphill* because the issue of qualified immunity had already been decided in favor of the defendants he could not overcome that ruling. It is interesting to note that the Washington attorney general's office is still arguing that the blanket search policy is constitutional, despite a jury finding to the contrary and that finding being upheld by the ninth circuit. See: *Castillo v. Gardner*, 854 F. Supp 725 (ED WA 1994).

Santeros Win PI

Santeria is a religion which combines aspects of Catholicism and African animism. Believers worship saints, or orishas, who have their own personalities and characteristics. Santeria is widely practiced in Caribbean and Latin American countries. In *Church of the Lukumi Babah Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217(1993), the supreme court discussed Santeria and its entitlement to constitutional protection. One of the requirements of Santeria is that its adherents wear colored beads with the colors of their patron Orisha as well as colored beads for the Orisha of specific days.

On January 4, 1994, the New York Department of Corrections (DOC) promulgated directive 4202 which allowed Santero prisoners to own but not wear beads. The DOC claimed that the policy was necessary to prevent the use of beads by gangs in the prison system. Two prisoners filed suit claiming that the directive violated their rights to religious freedom and expression. The district court appointed counsel and granted the plaintiff's motion for a Preliminary Injunction (PI) preventing the DOC from forcing compliance with its directive. The court's well reasoned opinion will be useful to anyone litigating a religious freedom claim.

In granting the PI the court held that the prisoners' religious beliefs were sincerely held and noted the importance of wearing beads to adherents of Santeria. The plaintiffs had set forth sufficient allegations to show irreparable harm if the

injunction were not granted as well as a likelihood of success on the merits. The court noted that in testimony the DOC defendants admitted they had done no research nor considered what impact their directive might have on Santeria practitioners. The court analyzed the prisoners' claims under the Religious Freedom Restoration Act (RFRA) which provides greater protection to prisoners seeking to practice their religions [See June, 1994, *PLN*], and held that the DOC had not shown any compelling interest in banning prisoners from wearing Santeria beads under their clothing. The court described the DOC's "security" concerns as "speculative," at best.

Of particular concern to the court was the fact that "traditional" religions such as Christianity, received preferential treatment under the directive while non-traditional religions, such as Islam and Santeria, received more scrutiny from prison officials. The court noted that prison officials had completely failed in their burden of presenting any evidence that gangs even used or had ever attempted to use Santeria beads in an illicit manner. "Defendants' further concern that some currently non-existent inmate group may in the future form and adopt colors, or that existing gangs may change colors, to coincide with the colors of plaintiff's Santeria beads, and then choose to wear them under their clothing without public display, is nothing less than 'pure speculation,' which, as I have already stated, cannot and should not be the basis for burdening plaintiff's constitutional rights." Because of these deficiencies the court held that the directive was unlikely to withstand scrutiny under the *O'Lone v. Estate of Shabazz*, 482 US 342, 107 S.Ct. 2400 (1987), standard which is substantially more deferential to prison officials than the RFRA standard.

Of interest to Santeria practitioners is the fact that the DOC agreed, after the litigation had commenced, to allow Santero prisoners to maintain shrines in their cells as long as the shrines were not visible to passersby and not made of cement or bricks. Practitioners of Santeria traditionally maintain a shrine at which they pray and make offerings to their orishas. Readers should note that this case is not a decision on the merits but only an order regarding a motion for a preliminary injunction. See: *Campos v. Coughlin*, 854 F. Supp. 194 (SD NY 1994).

Committing Journalism - The Prison Writings of Red Hog

By Dannie M. Martin & Peter Y. Sussman

Review by Bill Jeffcott

"I committed bank robbery and they put me in prison, and that was right. Then I committed journalism and they put me in the hole. And that was wrong." This is the opening statement in Dannie M. Martin's first book, *Committing Journalism*. Joining him in his effort is Peter Y. Sussman, a long time editor of the *San Francisco Chronicle's* "Sunday Punch" section.

Dannie Martin, also known as "Red Hog" throughout the prison system for his red hair and long past dispute over a pork chop, was serving a 33 year sentence at the United States Federal Penitentiary in Lompoc, California. And during this course of time, Sussman published a compelling report on AIDS in the federal prison system written by Martin. And with a powerful public response, this behind the walls prison journalist and free world newspaper editor, teamed up and went on to publish over fifty editorials over the next several years.

Martin, a self educated man, is well known for his alcohol/drug abuse troubles and his fighting abilities in his younger years. And in his book, he takes you down the road of hard knocks for a variety of offenses which has cost him several years of life behind prison walls.

However, in 1976 Martin's social worker Diane Osland, the daughter of a journalist, pressed Martin to fill his life long desire to write. It was from this point on, that the seed was planted.

Osland describes "Red Hog" as a powerful person in the prison system. "He took no shit from anyone, but he exercised his power without being abusive. In fact, he was the protector of the weakest, the frightened-younger, and the frail older cons. He treated people with dignity, and not out of fear."

In the 80's, Martin's life began to come together. His heroin addiction had subsided, he established important ties in the community and his crafted skill as a journalist had began to be put to good use.

What follows is a two-fold story. One of Martin and how he views life from behind prison walls and razor wire and how his editorials affected the public. One of Sussman, who became, Martin's

partner, colleague, friend and when necessary Martin's personal defender when the Federal Bureau of Prisons took steps to take away his First Amendment Right.

In his editorials, Martin describes his experiences with the swelling prison population in this country. He talks about racism, inadequate health care, petty bureaucratic harassment, convict sex, the good and bad side of prison guards and the disappearing folkways of the convict.

Martin shares his sometimes sad and sometimes humorous stories of the vast array of unique characters he meets along the way. One case in particular, Martin writes about Kevin Sherbondy, a young man of twenty-three, who was sentenced to 15 years in federal prison under the Career Criminal Statute for "possession" of a firearm. Sherbondy owned the gun solely for decorative purposes. Martin's stories about Sherbondy in Sussman's weekly column, "Sunday Punch" brought so much attention to Sherbondy's case that the Ninth Circuit court of appeals overturned his sentence, and Sherbondy became a free man.

Meanwhile, Sussman tells his side of the story as he and a team of legal experts come to Martin's defense. At issue here are the rights of prisoners to express themselves freely and publicly and a controversy which received sustained national attention, including coverage on ABC's *Nightline*.

Committing Journalism explores the Federal Prison system in explicit detail. Martin and Sussman send a clear message that it is essential that all outsiders know what goes on behind the walls of our nation's prisons.

Martin is not hypocritical. He admits that prison is meant to be for some, as with himself back in 1980. However, at a far fewer rate than we are warehousing prisoners today. He writes: "Sowing prisons means reaping convicts. It's another form of deficit spending. If the authorities can't control drugs with existing prisons, I wonder why they say that building more will help solve the drug problem. That's like saying that building more hospitals will stop disease."

For me, *Committing Journalism* has brought back vivid memories, as I too have served time behind the gray walls

and razor wire during my one hundred month tour with the Federal Bureau of prisons. I can relate to most all of "Red Hogs" writings. I have lived, learned and seen these experiences myself and I'm very well aware that there are many problems that exist within our country's prison system today. I highly recommend the writings of "Red Hog" for anyone who is unfortunate enough to be incarcerated. It's not only a "must read," but, I'm sure you'll find it beneficial and educational as well, regardless of where you may be serving your time.

To those of you out there in our "free society," there's not a shadow of a doubt you won't be finding *Committing Journalism* to be a dramatic read as Martin and Sussman take you through our complex criminal justice system. This is a first-class description of life behind bars, media censorship, the prisoner, his keeper and to all that live, work and die in our nation's prisons.

The London Hanged:

Crime and Civil Society in the Eighteenth Century

by Peter Linebaugh

(Cambridge University Press, 1992)

Review by Sandy Judd

A title like *The London Hanged* might make a person think this is another book about death—an 18th century version of those true crime books about people like Ted Bundy—but it isn't. Instead, it's about the struggle to survive. Author Peter Linebaugh is a social historian who has taught at such institutions as the Federal Penitentiary in Marion Illinois and Harvard University, giving him both the academic and the real-life credentials to write authoritatively about a struggle to survive that took place two centuries ago.

The book opens with the story of Jack Sheppard, a carpenter turned burglar who was famous for his ability to escape from prison. A folk hero hated by the ruling class for his attitude, Sheppard embodied Linebaugh's definition of idleness: "the refusal of discipline, subordination or obedience." After being sentenced to die, he received a visit by a prison official interested in saving his soul. Sheppard replied, "One file's worth all the Bibles in the world."

Linebaugh's main theme is that most of the people who were hanged in London during this period were executed for trying to support themselves or their families. A trend that comes up time and again

is the attempt by employers to take away the customary benefits that the workers counted on to survive. For instance, it was traditional for tailors to keep leftover scraps of fabric in order to piece together hats or children's clothes to sell at the open market. Employers who couldn't stop the practice themselves had the government make it illegal, and a bunch of tailors ended up on the 18th century version of death row.

Then, as now, "crime" was defined by the wealthy. Although today's working class is woefully unaware of this fact and unconcerned that the only people who ever get executed are poor, the working class of the 18th century wasn't nearly so gung-ho on capital punishment. For example, a judicial official named Wilmot was responsible for the condemnation of three men blamed for the beating death of a witness in a previous political trial. Wilmot barely escaped the wrath of the crowd at the men's public execution. As Linebaugh points out, public executions had long since ceased to terrorize the London masses.

There's a lesson here somewhere, but like most modern historians, Linebaugh refuses to point it out. Granted, the book is already 484 pages long, and not a sentence could be cut without losing either something essential or something entertaining, but many people who read it will walk away knowing more about capital punishment in 18th century London than they do about capital punishment in 20th century America. With any luck, however, the multitude of striking, and often humorous, details in this story about the past will stimulate us to more closely examine the present.

Scared Witless

The fear in her voice reverberated throughout talk-radio land. The elderly woman was among a parade of callers who passionately supported the caning of 18-year-old Michael Fay, who'd pled guilty to vandalism in Singapore. When the host asked why such a brutal punishment was appropriate, she replied that something, anything, had to be done to stop the epidemic of crime. She went on to say that she was unable to walk to her car right in front of her house without fear of attack. Noting that the caller lived in Foxborough, a reasonably bucolic suburb of Boston, the host asked if she or anyone she knew had been a victim of crime or

even an attempted crime in the past five years. "No." "Well, then how do you know it's so dangerous out there?" "Because they say it is." "Who are they?" "The people on television."

In January of this year, George Gerbner, who has been studying the social impact of television for decades, released a draft report on TV violence that comes the closest to connecting cause and effect. Dividing subjects into light viewers (under two hours of television viewing daily), medium viewers (two to four hours daily), and heavy viewers (more than four hours daily), he concluded:

"[H]eavy viewers are more likely than comparable groups of light viewers to overestimate one's chances of involvement in violence; to believe that one's neighborhood is unsafe; to state that fear of crime is a very serious problem; and to assume that crime is rising, regardless of the facts of the case.... Other results show that heavy viewers are also more likely to have bought new locks, watchdogs and guns for protection." The simple facts are these. Serious crime is not skyrocketing in this country. It is leveling off and, by some measures, even on its way down. But fear of crime - the obsessive, paralytic fear of being a victim - is at a fever pitch. According to Washington-based pollster, Peter Hart, 13 percent of the public fingered crime as the nation's number-one issue in January 1993. Today that statistic is 43 percent. A dispassionate look at the facts suggests we are not engulfed in an unprecedented wave of criminality. As University of Texas criminologist, Mark Warr noted, "Crime is not going up.... Violent crime, especially, has been essentially flat for a decade." Moreover, the nation's murder rate was frequently higher in the 1970s, a decade in which we were not nearly as consumed by fear of crime. People get their perceptions of the risk of crime from television. According to the New York-based Tyndall Report, the 1,506 minutes of air-time devoted to crime on the three major networks' nightly newscasts made it the third-hottest topic last year. More significant, those 1,506 minutes represent more than a doubling of the time allotted to the issue as recently as 1990, and nearly a 300-minute increase over 1992. Using a different methodology, the Washington-based Center for Media and Public Affairs reported that the number of crime-related stories on the network newscasts in 1993 more than doubled from the previous year,

a level of coverage completely out of proportion with the crime rate. And the number of murder related stories tripled. The programmers are quick to say they're just telling it like it is, that it's a nasty world out there and we'd better pay heed. They are certainly succeeding in turning the grandmother who called into the radio talk show - and millions like her - into virtual shut-ins. And in doing so, they are pulling off a dangerous and cynical con.

The above is excerpted from an article by Mark Jurkowitz in *Media Culture Review*, Vol. 3, No. 3, a publication of the Institute for Alternative Journalism. This is an excellent publication for those interested in studying media issues. Send \$18 (or \$36 for institutions) for a year's subscription of six issues to: *Media Culture Review*, 77 Federal Street, San Francisco, CA. 94107. (415) 284-1420.

A Prison a Week

According to the Bureau of Justice Statistics Bulletin, *Prisoners in 1993*, the nationwide 7.4% growth rate of state and federal prison populations in 1993 translates to 1,254 additional prisoners each week. This rate of growth can only be supported by building one 1,254 bed prison somewhere in the United States every week. Prison populations reached a record high of 948,881 in 1993. That number is presumably well over one million by now. State and federal prison populations have grown at an average rate of 8.3% per year since 1980 when the prison population stood at 329,821. The prison population has risen 187.7% since 1980.

California imprisons the largest number (119,951) followed in order by Texas (71,103), New York (64,569), Florida (53,048) and Ohio (40,641). The states with the highest incarceration rates (prisoners per 100,000 residents) are Texas (553), Oklahoma (506), Louisiana (499), South Carolina (489), and Nevada (438). The largest population increases in 1993 were reported by Connecticut (20.1%), Texas (16.2%), Minnesota (15.5%), Mississippi (15.2%), and Oklahoma (10.7%). In the five year period ending in 1993, the states with the largest increase in prison populations were Washington (79.1%), Texas (75.8%), New Hampshire (74.2%), Connecticut (71.0%) and Tennessee (65.9%).

The fastest growing segment of the prison population is female prisoners, whose population rose 9.6% in 1993. There are cur-

rently 55,365 women imprisoned in the U.S., 5.8% of all persons imprisoned.

The incarceration rate for black males is 2,678 (per 100,000 residents), for white males it is 372. For black females it is 143, for white females it is 20. Blacks are seven times as likely as whites to be imprisoned. Black males between the ages of 25 and 29 are imprisoned at the rate of 6,301 per 100,000. Since 1980 the incarceration rate for white males has increased by 121%, for black males, 141%.

Persons interested in obtaining a free copy of the BJS Bulletin can do so by writing the Bureau of Justice Statistics Clearinghouse, PO Box 179, Annapolis Junction, MD 20701-0179 and requesting a copy of Bureau of Justice Statistics Bulletin, *Prisoners in 1993*.

Asian Prison News

Indonesia: The warden at the Kedungpane prison in Semarang announced that new good time releases would be offered to prisoners who donated blood and organs. Each blood donation by a prisoner would result in a six month time reduction per year. Donation of an organ would bring an immediate time cut of six months. The warden claimed the program is voluntary and not open to prisoners serving life times.

Thailand: Thai prisons are faced with an AIDS crisis according to prison doctors. Thailand holds almost 100,000 prisoners in 108 prisons across the country with hundreds of seriously ill prisoners overburdening the prison system medical facilities. An average of one prisoner a day dies of AIDS according to Chon Lerwitvorapong, a prison doctor in Bangkok. Chon said the AIDS epidemic had reached a crisis point with 400 prisoners suffering from AIDS in Klong Prem's 320 bed hospital. The remaining AIDS patients have to sleep on the floor. Thai health officials estimate that more than 600,000 people in Thailand are infected with AIDS/HIV. It is not known how many prisoners are infected because prison officials cannot force prisoners to take blood tests and lack the resources to do so even if they so desired.

China: Human Rights Watch/Asia has issued a report accusing the Chinese government of using executed prisoners as that country's primary source of transplanted organs, in some cases deliberately botching executions to allow doctors to harvest the organs. The group

called on foreign governments to bar citizens from traveling to China to obtain organ transplants. The report states "Chinese doctors participate in pre execution medical tests, matching the donors with recipients and surgeons are commonly present at execution grounds to perform on site removal of vital organs."

The transplant program was started in the 1960's and includes the harvest of livers, hearts, lungs, kidneys and corneas. In some cases, kidneys are removed from prisoners prior to executing them. One surgeon was quoted as saying that at least 90 percent of China's transplanted kidneys come from executed prisoners, including some transplanted to foreigners for a \$30,000 fee. The report states that unless families agree to organ harvesting, government officials threaten to bill them for the prisoner's upkeep in jail, cost of the executioner's bullet and cremation. China conducts between 2,000 to 3,000 executions a year.

Crisis Continues in Salvadoran Prison System

As reported in the October, 1994, issue of *PLN*, the prison system of El Salvador remains locked in a crisis of overcrowding, spiraling violence and unrest. This trend continues. On September 13, 1994, prisoners at the Central Penitentiary in San Vicente, in the central part of the country, rioted, leaving 17 injured and three dead. The dead prisoners were accused of stealing from their fellow prisoners, a group of hooded prisoners cut the hands off of two prisoners before killing them, a third was decapitated. Police said the bodies also showed burn marks.

In a separate riot, the same day, at the San Miguel prison, 300 prisoners rioted, injuring at least 16 people. The riot was sparked by the transfer of 13 prisoners, classified as "highly dangerous" by the government, to other prisons. At least one policeman was injured after some 50 riot police entered the prison to suppress the riot and disarm prisoners. Firemen put out fires started by prisoners protesting poor living conditions.

Prison riots in El Salvador, generally sparked by bad conditions, have claimed the lives of 63 people since the end of 1993 and injured more than 85. The country's 14 prisons have a capacity of 3,500 but at last count held more than 6,250 prisoners.

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Federal Crime Bill Passes

By Paul Wright

In the October and November, 1993, issues of *PLN*, I wrote articles about the "anti-crime" proposals that had been submitted in the US Congress by democrats and republicans, respectively. I predicted then the most repressive aspects of both proposals would likely wind up in the final version of the law that was approved. Unfortunately, I was right. On September 13, 1994, Bill Clinton signed the final version of the crime bill into law.

While the crime bill as a whole is pretty outrageous the worst part about it is that they stole Mayday! May 1 has historically been celebrated by class con-

scious workers around the world as the day of unity and solidarity amongst working class people. It was originally started as a protest against the state murder of the anarchists convicted of the Haymarket bombings in Chicago in the 1880's. That makes what has happened all the more repulsive. The crime bill establishes May 1 as "Law Day USA." The law states: "It is the sense of the Senate that in celebration of 'Law Day USA' May 1, 1995, the grateful people of this Nation should give special emphasis to all law enforcement personnel of the United States, and the grateful people of this nation should acknowledge the unflinching and devoted service law enforcement personnel perform." "These personnel help preserve domestic tranquility and guarantee the legal rights of all individuals of this Nation." Yes, even Rodney King. **Have they no shame?**

The political spectacle that accompanied the crime bill illustrates a lot of what is wrong with the American political system. Essentially politicians got caught up in a frenzy of outbidding each other as to who could be "toughest" on "crime and criminals." This is an easy topic because there are no vested interests opposed to prisons, police or punishment. These laws only affect poor people and they don't have a voice that anyone with power in this country must listen to. After all, unlike health care or manufacturing, there are no prisoner or civil liberties Political Action Committees donating bundles of cash or taking politicians on junkets anywhere. It is worth noting that the Crime Bill is the only significant piece of domestic legislation passed by Clinton to date.

The same week congress passed the crime bill it also passed the "Bank Re-

form Bill." Included in this law is a provision which will prevent the government from pursuing negligence cases against the individuals who caused the collapse of the savings and loan industry (mainly by looting the institutions they were entrusted to run or that they owned). Federal banking regulators estimate that this "banker's escape clause" will cost taxpayers some \$1.6 billion in cases they would have won against the S&L thieves. That is money that would have gone towards the more than \$500 billion that taxpayers will be paying due to the collapse of the S&L industry. Bankers and financial institutions are able to lobby for laws like this. Thus, it is apparent that "crime" isn't the issue, the issue is who steals what from whom. Obviously it's much better to loot your own bank than rob someone else's. A lot safer too.

The mood of congress was accurately captured by Senator Joe Biden, himself an admitted plagiarist, who said "If someone came to the floor and said we should barb wire the ankles of anyone who jaywalks, I think it would pass." Of course he voted for the crime bill. One senator sought to bar the death penalty for juveniles and he was angrily voted down 93 to 7. The lone vote against the "3 strikes" law was Bob Packwood, hardly someone too concerned about his political image at this point. The crime bill comes as reported crimes are actually declining in the US but as the imprisonment rate continues to soar.

Samuel Glascock, a Virginia state legislator, accurately summed up the current political climate when he said: "This is an age politically where, if you are tough on crime, then I've got to be tougher. No matter what you float out, I've got to be tougher than you. No matter what I float

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Crime Bill (continued)

out, you've got to be tougher than me. You've got to wonder where it all leads." This crime bill is a perfect example where it all leads.

Initially the crime bill was slated to cost \$11 billion, then \$22 billion. The version signed into law authorizes \$30 billion to be spent. The actual amount spent will likely be much higher. While several billion go for the states to hire more cops, no funds are allotted for the states to hire prosecutors, judges or public defenders to process the resulting arrests. It is worth noting that early in his term Clinton made a tepid request from congress for a \$30 billion assistance package to cities for urban development. That was ridiculed as being "too much." So instead of a public housing policy, the US has a prison building policy, instead of aid to children we have juvenile prisons; etc. The money to pay for the crime bill is supposed to come from savings in reducing the federal work force by nearly a quarter million employees.

Republican critics claimed that the token amounts of money in the bill for youth recreation programs and such are "pork." But the real "pork" literally and figuratively, is in the police and prison provisions of the bill. Upcoming articles in *PLN* will focus on the waste and fraud inherent in prison building and maintenance. No concern is given for how money spent on that part of the repressive state apparatus is actually used.

To get an idea of the political impact this law will have, it's interesting to note that it criminalizes more behavior, increases penalties and makes more crimes eligible for the death penalty. It also seeks to disarm citizens by ensuring that only the police and military have access to paramilitary weapons. [A future issue of *PLN* will discuss the politics of gun control.] Typically empires in decline resort to increased military interventions abroad and increased repression at home in an effort to maintain political dominance. The crime bill fits into this context quite well. Unlike past empires in crisis, the US does not have any significant political opposition within its own borders. But, the ruling class isn't taking any chances.

While the mainstream media has given piecemeal tidbits about the crime bill, taken as a whole it is a major piece of

repressive legislation. Since 1945 every US Congress, except the 1990-92 congress, has passed a crime bill purported to end crime, "get tough" on criminals, etc. Those laws have failed and about the only likely result of this law, officially titled the "Violent Crime Control and Law Enforcement Act of 1994," will be massive prison overcrowding in the next two decades as its full impact takes effect. The final version of the bill is 120 pages long. It contains many administrative amendments to existing laws, clarifications, etc., in addition to its substantive portions. Here are the highlights of the law most likely to affect and interest our readers.

Prisons

Crowding: In an amendment sponsored by senator Jesse Helms and passed without debate by both houses of Congress, the bill seeks to limit the power of federal courts to impose remedies in prison overcrowding suits where constitutional violations result. "A federal court shall not hold prison or jail crowding unconstitutional under the eighth amendment except to the extent that an individual plaintiff inmate proves that the crowding causes the infliction of cruel and unusual punishment on that inmate." Federal courts are forbidden to place population caps on jail or prison, as an injunction, unless "crowding is inflicting cruel and unusual punishment on particular identified prisoners." These requirements do not prevent federal courts from ordering improved medical or health care or imposing civil contempt fines and damages.

With regards to consent decrees limiting prison and jail populations, the bill states that such decrees shall be subject to reopening at prison officials' request no less than every two years. The law applies to all consent decrees in effect and litigation pending at the time of passage. The

law contains a sunset provision whereby it is automatically repealed five years after enactment. In practice, laws with sunset provisions are routinely extended by Congress when they are about to expire.

It does not appear that this law will have much impact on prison overcrowding litigation. Since the Supreme Court's 1991 decision in *Wilson v Seiter*, few if any courts have been able or willing to find an eighth amendment violation resulting from prison overcrowding. Courts cannot find constitutional violations, nor issue injunctive relief, unless harm has been proven to specific plaintiffs. Most population caps are the results of consent decrees. Under the Federal Rules of Civil Procedure such decrees can be reviewed upon the motion of either party at any time. Again, the law appears to codify existing law and practices into legislation. The obvious attempt is to allow the massive overcrowding of prisons with no form of relief. With prison systems operating at 180% of capacity in some states it is not surprising that Congress has made an attempt to head off injunctions at the pass, so to speak. As a constitutional matter, it is not clear whether this amendment will pass constitutional muster on separation of powers grounds. Historically, federal courts have wide leeway to remedy a constitutional violation once it is found. Courts have imposed population caps on prisons and jails in the past because it is more immediate relief than ordering states and cities to build more jails or prisons or order the release of prisoners. Population caps allow defendants to decide how to allocate their resources.

The law also requires that any new or proposed federal legislation imposing criminal penalties be accompanied by a "Prison Impact Assessment." The attorney general and sentencing guidelines commission must provide a report stating what impact such laws will have on

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prison, probation and post-prison supervision populations and how much these changes will cost in terms of prison construction, etc.

Pell Grants: This law abolished Pell grants for prisoners. A detailed article on the subject by Dan Pens follows this article.

Good Time: 18 U.S.C § 3624 was amended so that federal prisoners serving a sentence of more than 1 year for a violent crime "... may receive credit towards the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to the determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance" with disciplinary rules.

Location: In what could be called the "Leona Helmsley" law, the bill states that in designating a prisoner's place of imprisonment or transfers, "there shall be no favoritism given to prisoners of high social or economic status." Leona Helmsley, serving a two year sentence for tax evasion was initially confined at the women's prison in Lexington, KY. She was later transferred to the prison at Danbury, CT, about 20 miles from her palatial estate and billionaire husband. So, who's going to enforce this?

Money for State Prisons: The bill allocates nearly \$8 billion dollars for use as matching grants to states to build and operate prisons, called "Violent Offender Incarceration Grants." The money comes with a lot of strings attached. The federal government will only provide up to 75% of the money, the states have to come up with the rest. To be eligible, the state must have laws similar to federal law requiring that prisoners serve at least 85% of the sentence imposed by the court. For states with determinate sentencing systems this will be easy enough to comply with. States with indeterminate sentencing systems will likely have to change their sentencing systems in order to comply and be eligible for the funds. The money can be used to build, operate, expand or modify prisons so long as it is designed to ensure "that prison cell space is available for the confinement of violent offenders." As most state prisoners are serving time for drug or property crimes there will not be much impact on prison populations until the sentencing of such offenders is changed. The money runs out

in the year 2000. So states who use the money to build new prisons or expand existing ones will find themselves stuck with the operating costs and more than likely, a much higher prison population than if they had foregone the money.

States getting the money must enact policies within 18 months after the law was signed, "to determine the veteran status of inmates and to ensure that incarcerated veterans receive the veteran's benefits to which they are entitled."

Aliens: In recent months several states (California, Florida, Texas, New Jersey and Arizona) have sued the federal government for the cost of imprisoning illegal aliens who commit crimes in those states. The states claim that if the federal government, i.e. the Border Patrol and INS, did a better job patrolling the nation's borders this would not be a problem. Congress provided \$1.8 billion dollars to reimburse states who incarcerate illegal aliens in their state prison systems. The law also allows states to turn such aliens over to the federal government for incarceration.

Drug Testing and Treatment: Federal courts are required to establish a program so that all offenders on post prison supervision and probation are subject to drug testing after release. In cases where imprisonment may result from a positive result or the defendant denies drug use, an accurate confirmation test must be used.

The Bureau of Prisons (BOP) was ordered to establish substance abuse treatment programs within facilities so that by 1997 all prisoners eligible for the program, i.e. those with substance abuse problems, can receive treatment. Priority for treatment is established by proximity to release. The program requires not less than 50% of eligible prisoners receive treatment by the end of fiscal year 1995. Prisoners convicted of non violent offenses may have up to one year reduced from their sentences by the BOP upon completing the program. Over \$100 million was allotted for this program. The programs must last between 6 and 12 months and be "in residential treatment facilities set apart from the general prison population."

The bill also allots \$270 million for state prison systems to establish a similar substance abuse treatment program. States must put up at least 25% of the money, the feds can supply the rest.

Family Unity Project: Criminal defendants sentenced to terms of less than 7

years who are the primary care giver of children under seven years of age can be permitted to serve their sentences, with their children, in community correctional facilities. The law allocates money to both the states and BOP to establish the project in an attempt to alleviate the effects that incarceration has on small children and family relationships.

Release Notification: Five days before federal prisoners are released from custody the BOP is required to give written notice of the release to the top law enforcement officer of the state and local jurisdiction where the ex-prisoner will be residing. The BOP will also provide them with any address changes. The law applies to prisoners convicted of drug or violent crimes.

Prison Job Training: The attorney general was instructed to establish an Office of Correctional Job Training and Placement within the Justice Department. The goal is to "encourage and support job training programs, and job placement programs, that provide services to incarcerated persons or ex-offenders." It will essentially act as a clearinghouse for information on prison employment, i.e. slave labor, and provide technical and special assistance to state prison systems.

TB: \$5 million was appropriated for the prevention, diagnosis and treatment of tuberculosis in prison systems across the country. The money is in the form of a 50% matching grant. Given the fact that a TB epidemic is sweeping the country's prisons, largely brought on and encouraged by overcrowding and inadequate ventilation systems, \$5 million seems unlikely to do much to address the problem. After all, the causes of TB are well known as are its treatment and prevention.

DNA Database: \$40 million was allocated for the attorney general to distribute to states in order to standardize and improve the quality of DNA identification labs and systems. More money will go to establish a DNA index, to be maintained by the FBI, listing DNA samples of convicts, from crime scenes and unidentified human remains.

Death Penalty and Punishment: I will discuss the rest of the death penalty provisions separately, but will list those applying specifically to prisoners here. Federal prisoners serving life sentences can be killed by the government now if they are convicted of murder while in prison, federal prisoners who have escaped and killed someone, to kill a prison

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guard if the guard is transporting the defendant between states or if the state prisoner is also serving a federal sentence. Killing BOP guards also qualifies for the death penalty.

Congress ordered the Sentencing Guidelines Commission to increase the penalties for those convicted of using or smuggling illegal drugs in federal prisons. It also prohibits probation for anyone convicted of smuggling drugs into prison.

Weights: The house of representatives passed an amendment which would have banned the use of weights for recreational purposes in federal prisons. This amendment did not pass in the final law. So the BOP weights are safe for now.

Police and Repression:

The above provisions apply to those who have already been convicted and are in prison. But, a good portion of the bill was also designed to ensure that prisons don't run out of prisoners anytime soon. Not only was more conduct criminalized, sentences enhanced, punishment harshened but it also came with more cops.

More Cops: One of Clinton's campaign promises was that if elected he would put 100,000 more cops on the street. The crime bill purports to do that but critics say it will actually fund far fewer, between 40,000 and 50,000. According to the Department of Justice, in 1992 state and local police agencies employed 841,099 full-time police and civilian personnel with an additional 90,000 part time employees. This number doesn't include prison employees nor federal law enforcement agencies. The crime bill seeks to increase the number of uniformed police by more than 10%. This is a significant increase.

The bill allots almost \$10 billion dollars for the states to use to hire more cops at the local level. The money will be distributed according to a complex grant formula whereby the federal government only funds up to 75% of the cost of hiring a new cop for the first year and that money decreases each year until it ends in the year 2000. Whether cities faced with decreasing tax bases and increasing expenses will be able to afford to hire more police will remain to be seen. The bill also emphasizes that police departments should hire military troops who have been

discharged as a result of military force reductions. One way that local police departments could increase the number of police is by turning over clerical and administrative tasks to civilians who cost less to employ, however, that is unlikely to happen as it would eliminate cushy office jobs for cops too old, fat or burned out to actually police anything.

Large chunks of money were allocated for the hiring of more federal law enforcement agents, mainly with the Border Patrol and Immigration and Naturalization Service, but also with the FBI, DEA and all branches of the treasury police, i.e. BATF, Customs, IRS, Secret Service, etc. The judiciary and federal prosecutors also received more money. All told the sum is almost \$1.3 billion dollars. This is money in addition to these agencies' normal authorized budgets and in addition to the funds allocated specifically for the hiring of more federal agents. It is interesting to note that no funds are allocated for providing a defense to the indigent criminal defendants who will be the targets of this frenzied police activity.

3 Strikes: The centerpiece of Clinton's crime bill is the "3 Strikes You're Out" provision. I discussed the shortcomings of this type of law in the June, 1994, issue of *PLN*, so I won't cover that again. The federal law provides that anyone convicted of a serious violent felony in federal court shall be sentenced to a mandatory term of life imprisonment if: "the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a state of two or more serious violent felonies, or one or more serious violent felonies and one or more serious drug offenses; and each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense." Thus, separate trips through the courts are not required for a defendant to be three struck, it can happen in one proceeding for subsequent offenses. Felonies that will not qualify as "strikes" under this law are robberies where no weapon or threat of a weapon was used and did not result in death or serious bodily injury, and arson if it did not pose a threat to human life. The law does not apply to crimes committed on Indian reservations. Sentences can be overturned if a prior conviction which

served as the basis for the 3 strikes sentence is overturned by a state or federal court.

The law allows 3 strike defendants to be released from prison if they meet the following criteria: are at least 70 years old and have served at least 30 continuous years in prison and the director of the BOP determines that the person is not a danger to the community or anyone else.

Computers: The crime bill makes it a misdemeanor to transmit computer viruses that damage or cause damage to any computers, programs or if the person intends that such damage occur. It also allows for civil lawsuits to be filed by the allegedly damaged party against the originator of the virus. For it to be a federal crime the activity must have an interstate commerce nexus, which means that any virus transmitted electronically will qualify as a crime while those implanted at the computer site will not.

"Terrorism": The statute of limitations for "terrorist" crimes was extended to 8 years and the penalties were increased. Counterfeiting US currency abroad was criminalized. A new law criminalizes "Providing material support to terrorists." This is defined as any person in the US who "provides material support or resources or conceals or disguises the nature, location, source or ownership of material support or resources knowing or intending that they are to be used in preparation for or in carrying out a violation" of various criminal offenses or for the concealment and escape of such activities. Material support is defined as: "currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, but does not include humanitarian assistance to persons not directly involved in such violations." The law has the potential of being used against the anti imperialist solidarity movement here in the US. The law has a disclaimer that investigations aren't to be initiated based on activities protected by the first amendment. Given past practices where the FBI has investigated and harassed groups like CISPES (Committee in Solidarity with the People of El Salvador) and such, this will have little real life application. After all, who is going to enforce it?

Aliens: The law provides for the prompt deportation of aliens convicted of felonies and speeds up the deportation process for non criminal aliens whose applications for asylum have been denied. It permits the attorney general to grant US citizenship to foreign citizens who are willing to inform on criminals, "terrorists" or otherwise help US "national security." It also increases the penalties for passport and visa violations.

Sex Offender Registration The law orders states to establish the registration of all sex offenders convicted of crimes against minors or who are "sexually violent predators." States must establish a registration system for sex offenders within three years of enactment. While the federal government can't order states to carry out federal mandates, in this case it will withhold 10% of the funds non-complying states would otherwise receive under 1968 Crime Control Act.

Increased Penalties: The crime bill doubles or otherwise increases the penalties for a wide range of offenses, including: theft of artwork, virtually all crimes involving firearms and explosives, hate crimes, civil rights violations, assaults on members of Congress, diplomats, and other federal employees, arson, trafficking in counterfeit goods, introducing non-indigenous species to Hawaii and mailing animals or plants that are illegally taken. It also criminalizes the trade, barter, or sale of the Congressional Medal of Honor

Mandatory Minimums: The last several years have seen a lot of activism and criticism of mandatory minimums. These laws fix a penalty against defendants convicted of possessing specified quantities of drugs or weapons. The result has been long sentences for first time offenders and minor drug offenders. The crime bill allows a judge to disregard a mandatory minimum and go by sentencing guidelines if the defendant meets certain criteria: they don't have more than one criminal history point; did not use violence or threats of violence; the offense did not result in death or injury to any person; the defendant was not an organizer of the offense nor part of a continuing criminal enterprise and at the time of sentencing has "provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct..." that the defendant has no information to provide can't be used to defeat this section. Unfortunately,

the law is not retroactive to persons already convicted. It applies only to sentences imposed on or after the 10th day the law was signed.

Crimes Against Women: Because federal laws only apply to crimes committed on federal property or those where there is an inter-state commerce connection it is unlikely this law will apply to many defendants except for crimes committed on Indian and military reservations, etc. The law makes restitution mandatory for all defendants convicted of a federal sex offense; punishments are to be enhanced by the Sentencing Guidelines Commission; crossing state lines to commit domestic violence is made a federal crime as is interstate violation of a state court protective order. Grants are made to encourage states to develop mandatory arrest policies for those accused of domestic violence.

A section of the law of interest to women prisoners in particular is the "Civil Rights for Women" section. It allows women to sue, in federal court for money damages, "A person (including a person who acts under color of any statute, ordinance, regulation custom, or usage of any state) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) [that is the right to be free from gender motivated crimes of violence] shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief." It also authorizes attorney fees for prevailing plaintiffs. A female plaintiff can sue under this act whether or not the act resulted in criminal charges. Specifically exempted are "random acts of violence unrelated to gender."

Grants are provided to train and educate court personnel in state and federal courts in gender related issues such as rape, sexual assault, domestic violence, etc.

Money is also allocated creating a federal database of stalker and domestic violence defendants. Funds will also go to battered women's shelters, domestic violence programs, etc.

Evidentiary Rules: The Federal rules of evidence, which govern the admissibility and use of evidence in federal civil and criminal proceedings, have been amended and added to. Rule 412 was modified to ban the introduction of evidence, in cases involving sexual miscon-

duct, of the alleged victim's sexual predisposition and other sexual behavior. Rule 413 is created which allows evidence to be introduced against defendants in sex offense cases concerning the defendant's commission of other sex offenses, whether or not the alleged offense resulted in any criminal charges or a conviction. In other words, this will allow virtually any type of allegation to be made against a certain class of defendants even if they were never charged, much less convicted of the offense. Rule 414 does the same for crimes involving child molestation whether they are civil or criminal cases.

Children: The law increases the penalties for crimes committed by children and youths. It also requires that juveniles of 16 and 17 be tried as adults if they commit violent offenses. It also makes membership in a "criminal street gang" a federal offense and increases the penalties for crimes allegedly committed as part of such gang activity. It is readily apparent that the provisions of this law will fall mainly on minority youth.

Death Penalty: The federal death penalty is expanded to include about 60 new offenses punishable by death. While many commentators in the mainstream media have stated that this law will have little effect on crime or defendants, that is not the case. It substantially widens the death penalty net to sweep a wide variety of crimes, many of which are already state offenses, into its grasp. The result is going to be felt mainly by minorities when federal prosecutors decide which cases to prosecute rather than allow states to deal with [See *PLN*, Vol. 5, No 6, on the racist application of the current federal death penalty statutes.]

The statute codifies the balancing test approved by the supreme court as to when the death penalty shall actually be imposed. It sets out the mitigating and aggravating factors that are to be weighed, and requires notice and a special hearing as to when the death penalty will be sought against a defendant. Special findings of fact by the fact finder are required once a death penalty verdict is returned. This will assist in appellate review of the sentence. The law provides for appellate court review and states death sentences can't be reversed if any error is harmless, including the findings of aggravating factors. While most state death penalties require automatic state supreme court review, the federal law requires no such

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review by the US supreme court. The marshals service is designated to carry out the death sentences imposed by the federal courts and will use the means of execution used in the state of conviction. If that state doesn't have the death penalty the court will pick a state that does. It also allows the use of state death row facilities even though *PLN*, Vol. 5, No. 2, reported that the BOP is building its own death row at the federal penitentiary at Terre Haute, IN.

Since the supreme court authorized the use of the death penalty in 1976 it has held that it can only be applied in cases which involve the actual loss of life. The federal death penalty statute goes beyond this and is likely unconstitutional because it permits the death penalty against defendants convicted of drug trafficking as part of a continuing criminal enterprise, regardless of whether any loss of life has occurred. The law specifically exempts Native Americans if the sole federal jurisdiction is that the offense occurs on Indian Reservations. It also states that the mentally retarded and pregnant women can't be executed.

The offenses for which the death penalty is authorized for now are: murder by federal prisoners serving life sentences; for civil rights murders; murder of federal law enforcement officials; drive by shootings; foreign murders of US nationals; rape and child molestation murders; sexual abuse resulting in death; murder by escaped prisoners; sexual exploitation of children resulting in death; murders with firearms in federal facilities (look out postal workers!); murder of state law enforcement officials assisting federal officials; murder of persons aiding federal investigations; killing federal witnesses; violence against maritime navigation if death results, violence against fixed maritime platforms [in what should be called the "teamster amendment" the law specifically bars federal prosecution if the death on a fixed maritime platform occurs "during or in relation to a labor dispute."], violence at international airports resulting in death (unless it is part of a labor dispute); use of weapons of mass destruction if death results (i.e. poison gas, biological or atomic weapons); alien smuggling if death results; espionage even if no death results, killing foreign officials; kidnapping; wrecking trains;

robbing banks; hostage taking; murder for hire; racketeering; genocide; car jacking; air piracy; murder with explosives; mail bombings and dangerous devices; retaliatory killing of informants and witnesses; killing of court officers and jurors and first degree murder.

Many people laughed stating that the death penalty is now authorized for killing poultry inspectors. That is true, and not many people kill poultry inspectors. But it is readily apparent that the federal government is now going to get into the killing business in a big way. Efforts to ban the execution of juveniles were voted down and not included in the law.

The Racial Justice Act (RJA) has been introduced in congress every year since 1988. It would allow death penalty defendants to introduce evidence showing that the death penalty had been administered in a racially biased manner by introducing into evidence statistics as to how the death penalty is applied. In *McLeskey v. Zant* the supreme court rejected the use of statistics to show racial bias in the death penalty, the RJA would nullify that ruling. As reported in *PLN*, Vol. 5, No.9, extensive evidence exists showing that the death penalty is administered in a racially biased manner. In opposing the RJA Senator Orrin Hatch said "It would end the death penalty as we know it." Why the fear of the RJA? After all, similar statistics are used in court everyday in discrimination cases. Because death penalty advocates can't "explain" why black men, who constitute about 5% of the US population make up some 40% of the nation's death row population. Or why five out of the six defendants convicted under the federal death penalty law of 1988 are black and the remaining one is Hispanic. Could it be racism? Well, death penalty defendants aren't going to be given that chance to prove that it is because, while approved by the house of representatives, it was again voted down by the senate. Members of the Congressional Black Caucus initially tried to pressure Clinton into pushing for the RJA but eventually they capitulated as Clinton said he didn't want the RJA to "hold up" the crime bill.

Firearms: The only thing that came close to halting passage of the crime bill was the inclusion of the ban on "assault weapons" which was opposed by the National Rifle Association (NRA). The provisions were included and the whole bill squeaked by the senate and house. The

law bans "assault weapons" and magazines with a capacity of more than 10 rounds. The law lists 19 weapons by name (all model of Kalishnikov rifle, Uzi and Galil rifles; Beretta AR-70 rifle, Fabrique National FAL, LAR and FNC rifles, Steyr AUG rifle rifle, SWD M-10, M-11, M-11/9 and M-12 pistols, Intratec Tec-9, TEC-22 and TEC-DC9 pistols; Colt AR-15 rifle and the Street Sweeper and Striker 12 shotguns;) but the law will also ban about 184 weapons that are copies or similar to the above weapons. It defines and bans "assault weapons" as being those with detachable magazines which have two or more features such as folding stocks, pistol grips, bayonet mount, flash suppresser, is a semi-automatic version of an automatic weapon or weighs more than 50 ounces. 650 named weapons are exempted from the ban but they do not meet any of the above definitions and are almost entirely sporting or target weapons.

One of the interesting provisions of the gun law is that it too has a sunset provision, it is automatically repealed within 10 years of enactment. The law also orders the attorney general to conduct a study to determine what effect, if any, this law has on violent and drug trafficking crime. The weapons ban applies only to weapons made or imported in the future, those already manufactured or imported are legal and can be sold or owned. Likewise for magazines. All large capacity magazines produced after the act went into effect must have a serial number, those without a serial number are presumed produced before the ban and thus are legal. An article by NRA activist and lobbyist Neal Knox stated that before the law went into effect a five year supply of the banned weapons and at least a 10 year supply of banned magazines were produced or imported. Thus, the law's only effect is going to be to increase the price of the items rather than limit their availability.

Now that the crime bill has passed in time for the mid-term elections we can wait until the next election for yet another crime bill to be passed. It is important to bear in mind that this bill only pertains to the federal government. On the state and local level similar laws are being passed for much the same reasons by the same opportunist politicians. The goal and effects remain the same: criminalize poverty and then give out harsh punishment for it.

Prisoners Lose Pell Grants

by Dan Pens

A provision of the \$30.2 federal anti-crime bill was the elimination of prisoners from eligibility for federal Pell Grants. Much attention was given to this portion of the debate by the mainstream media. Senators and Congressional Representatives know a good sound bite when they see one. Junk-food journalism shows like ABC's *Prime Time*, and NBC's *Dateline* hyped the "shocking" idea that criminals were milking the taxpayers for Pell Grants while needy recipients in the community did without. But, as usual, there was another side to the story that got lost in the political posturing and media hype.

The federal Pell Grant was created in 1965 by Senator Claiborne Pell, D-Rhode Island, to aid low income students for college. The 1965 bill stated that no qualifying low income persons would be excluded. Prisoners were specifically mentioned in the bill and were intended to be included in the grant program. Media hysters insinuated that prisoners were taking advantage of the opportunity for Pell Grants because of an oversight in the original Pell Grant Bill that failed to specifically exclude them.

The \$6.3 billion program is considered a quasi-entitlement says the U. S. Department of Education, and receives whatever funding is necessary for grants to all income eligible persons. Of that \$6.3 billion in the most recent fiscal year, a total of \$35 million was allotted for prisoners. Most of that amount was in the form of federal aid paid not directly to individual prisoners, but in the form of payments to state programs designed to provide educational services to their prison inmates. The \$35 million allotted to prisoners represents less than *six tenths of 1 percent* of the \$6.3 billion total. Political rhetoric has propelled the myth that the money wasted on prisoner Pell Grants will now be used to provide assistance to more worthy recipients in the community. The truth of the matter is that the \$35 million saved won't stay in the education budget. It will simply be retained by the U.S. Treasury (presumably to help pay for the \$9.8 billion earmarked for construction of more "anti-crime" prisons).

Forty percent of all state prisoners are unable to read. Only 25 to 30 percent have

high school diplomas when they enter prison. By contrast, in the general population, 85 percent of all men aged 20 to 29 have high school diplomas. Some prisoners earn high school equivalency certificates and move on to prison college courses. The Texas prison system did a study this year of prisoners released between September 1990 and August 1991 and found a direct correlation between education levels and recidivism (those who return to crime) rates. The report stated a recidivism rate of only 13.7 percent for prisoners who had associate's degrees, and 5.6 percent for those with bachelors degrees. No prisoners who earned a masters degree returned to prison.

According to Stephen J. Steerer, director of the Maryland-based Correctional Education Association, cutting Pell Grants will kill prison college programs in some states, like Maryland, that depend entirely on the federal program for funding. In Ohio, state Senator Eugene Watts introduced legislation that would also halt the use of state funded Ohio Instructional Grants for prisoners. If approved, the bill would abruptly halt college programs in Ohio prisons.

Prisoners in almost every state prison are required to "program." Those who attend classes fulfill their programming requirement in that way. As the federal educational funding dries up and prison colleges close, prisons will have to find ways to create meaningless jobs for prisoners displaced from education. About 9% percent of Ohio's 40,000 prisoners are enrolled in college courses. If college courses are terminated, that means Ohio state prison officials will have to create 3,600 new leaf raking and sidewalk sweeping jobs in order for prisoners to fulfill the requirement that they program. Has anybody conducted a study to see what the recidivism rate is for illiterate prisoners who leave prison with degrees in leaf raking and sidewalk sweeping?

Altered Disc. Evidence Violates Due Process

John Grillo is a New York state prisoner. He was infracted after a urinalysis allegedly showed he was positive for the use of opiates. He was found guilty at the disciplinary hearing and sentenced to 360

days in segregation and the loss of privileges. Prior to the hearing Grillo was given copies of the urinalysis test forms that were to be used at the hearing. The form that Grillo was given stated that the test had been performed at 9:15 AM. The form submitted to the hearing officer for use as evidence stated that the test had been performed at 10:10 AM. The hearing officer made no inquiry to determine how or why the copy used at the hearing was altered after being separated from Grillo's copy.

The urinalysis testing form has a box asking whether the reagent was discolored when tested, if it is, this indicates the test is unreliable and should not be used. The copy of the form given Grillo has this area left blank, however the copy used by the hearing officer was marked "no." At his hearing Grillo attempted to argue, on the basis of the copy he was given, that the test was unreliable and should not be considered as evidence against him. When Grillo revealed the discrepancy at the hearing, the hearing officer attempted to mark the box "no" on Grillo's copy, Grillo stopped him. Again, no inquiry was made by the hearing officer to determine how or why the forms were altered. The differences in the forms were not discovered by Grillo until the last day of the disciplinary hearing and were not mentioned by the hearing officer in his written ruling finding Grillo guilty.

Grillo petitioned the state courts for relief claiming that the use of the altered documents at the disciplinary hearing violated his rights to due process under New York state law. The court agreed and ordered Grillo's release from segregation 235 days into the sanction and ordered the expungement of the infraction from his prison records. Grillo then filed suit in federal court under 42 U.S.C. § 1983 seeking money damages claiming that the disciplinary hearing had violated his federal rights to due process under the law. The district court held otherwise and granted summary judgment to the defendant prison officials. On appeal, the court of appeals for the second circuit affirmed in part and reversed and remanded in part.

In granting the defendants summary judgment the lower court relied on *Freeman v. Rideout*, 808 F.2d 949 (2nd Cir. 1988) which held that prisoners have no constitutional right not to be subjected to false or perjured disciplinary reports as long as they receive a hearing which comports with the minimal due process re-

Altered Evidence (cont.)

quirements set forth in *Wolff v. McDonnell*, 418 US 539, 94 S.Ct. 2963 (1974). Thus, the lower court concluded that even if the evidence against Grillo had been tampered with, no due process violation occurred because he had received a hearing which afforded him his *Wolff* rights.

The appeals court held that it was improper for the lower court to resolve this issue, as a factual matter, on summary judgment. It was also improper as a legal matter because the evidence indicated he wasn't afforded a proper *Wolff* hearing. "A hearing in which the false accusation or evidence is shown to the fact finder but concealed from the accused would not comport with the due process standards of *Wolff v. McDonnell*. It is but a slight turn on Kafka for the accused to be required to mount a defense referring to prison documents that, unbeknownst to him, differ from those before the hearing officer. Unquestionably, the right of an accused to know the evidence against him and to marshal a defense is compromised when the evidence he is shown differs from the evidence shown to the fact finder."

"... the proposition of *Freeman*—that any unconstitutionality inhering in a false accusation is vitiated when it is tested in a fair hearing—cannot support summary judgment where there is evidence that the accused was not shown the allegedly spurious evidence used against him, and therefore, arguably, did not receive a fair hearing." The court concluded that both Grillo's procedural and substantive due process rights were violated by the use of altered evidence at the hearing.

The court held that the lower court should have allowed Grillo an opportunity to prove that while he did eventually see the altered documents, by the time he did so it was too late to mount an effective defense to the charges against him. That the hearing officer likely would have shown him the altered documents had he asked to see them does not dispel the procedural unfairness of the hearing. "Grillo did not ask to see the documents, because, through no fault of his own, he was unaware that they differed from the copies furnished to him." It was not proper for the lower court to grant summary judgment on this issue to the defendants because it wasn't clear that Grillo received a hearing comporting with *Wolff*.

The appeals court also noted that *Freeman* has been substantially limited by rulings in *Franco v. Kelly*, 854 F.2d 584 (2nd Cir. 1988), where the court held that *Freeman* applies only to cases involving procedural, not substantive, due process violations. In that case a suit claiming prison officials had falsified charges was allowed to go forward because it involved violations of substantive due process. In *Lowrance v. Achtyl*, 20 F.3d 529 (2nd Cir. 1994), the court recently held that arbitrarily imposed confinement can constitute a substantive due process violation. "Substantive due process protects individuals against government action that is arbitrary, conscience shocking, or oppressive in a constitutional sense, but not against government action that is 'incorrect or ill-advised.' Moreover government action might be so arbitrary that it violates substantive due process 'regardless of the fairness of the procedure itself'." This claim was remanded to the lower court for trial.

The court noted that some of the defendants in this case may be dismissed for a lack of personal involvement in the violation of Grillo's rights or they may be entitled to qualified immunity. No views were expressed as to what damages Grillo might be entitled to. The court affirmed summary judgment in favor of the defendants on Grillo's claim that he received inadequate assistance from the staff person assigned to assist him and because the hearing officer sought advice from another hearing officer on how to conduct the hearing. See: *Grillo v. Coughlin*, 31 F.3d 53 (2nd Cir. 1994).

No Help for Disc. Hearings

Ronald Kulow is an Iowa state prisoner. Kulow suffers from brain damage, has an IQ between 70 and 74 and borderline intellectual functioning. After having an altercation with another prisoner he was placed in involuntary protective custody where he received numerous disciplinary infractions. At the disciplinary hearings he requested assistance from counsel or a counsel substitute in order to prepare his defense. He also sought assistance at his periodic classification hearings. His requests were consistently denied by prison officials. Kulow filed suit claiming that the denial of counsel or other assistance at the hearings violated

his rights to due process. The district court dismissed the suit. The dismissal was affirmed by the court of appeals for the eighth circuit.

In *Wolff v. McDonnell*, 418 US 539, 94 S.Ct. 2963 (1974), the supreme court held that the constitution does not require that prisoners receive counsel at prison disciplinary hearings. However, the supreme court noted that some prisoners, i.e. illiterates or where complex issues are presented, will require assistance from a designated staff member or prisoner as a counsel substitute.

Kulow argued that his borderline intellectual functioning, poor comprehension and limited ability to communicate place him in the category of prisoners entitled to counsel substitute under *Wolff*. The appeals court characterized this as a contention that prison officials have a constitutional duty to make a general inquiry into a prisoner's competence to represent themselves at prison disciplinary hearings. The court rejected that claim, noting that the disciplinary hearing officer had found Kulow competent to defend himself against the "non-complex" type of disciplinary charges he faced. Likewise, he had no right to assistance at his classification hearings.

Circuit Judge Gibson dissented to the majority opinion, noting "If the due process clause has any meaning, an individual such as Kulow should be provided counsel or counsel substitute to assist in presenting his case." See: *Kulow v. Nix*, 28 F.3d 855 (8th Cir. 1994).

BOP Can't Punish Detainees

Vladimir Collazo-Leon is a pretrial detainee in Puerto Rico, held by the federal Bureau of Prisons (BOP). While going to a visit he allegedly offered a jail guard a bribe if the guard would help him escape. The guard inflected Collazo and at a disciplinary hearing Collazo was found guilty and sentenced to 90 days in disciplinary isolation and loss of phone and visiting privileges for 6 months. Collazo filed a writ of habeas corpus claiming that the disciplinary hearing violated his right to substantive due process of law because, as a pretrial detainee not convicted of any crime, he cannot be punished. The district court agreed and granted the writ.

The district court noted that in *Bell v. Wolfish*, 441 US 520, 99 S Ct. 1861 (1979) the supreme court had held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt." Thus, a court examining a detainee's claim that he was punished without being convicted of a crime must inquire as to whether the restrictions placed on the detainee amount to punishment. The court gave a detailed examination of detainees' historical right to be free from punishment.

The BOP argued that it had only disciplined Collazo to maintain discipline pursuant to 18 U.S.C. § 4042. The court held that this statute did not authorize the disciplinary sanction because 28 C.F.R. § 541.20, the BOP's disciplinary rules, specifically state they are for the purpose of punishment and deterrence of prisoner misconduct. In *Wolfish* the supreme court had held "Retribution and deterrence are not legitimate non-punitive governmental objectives." Noting the detrimental effects that solitary confinement has on people, the court concluded that the sanction imposed upon Collazo was indeed punishment forbidden by the due process clause. Responding to the BOP's argument that only by punishing Collazo in the form of segregation could they provide a safe and orderly environment for prisoners, the court asked how BOP officials would provide for such an environment after Collazo had served his 90 day sentence in isolation and was once again released to the general population.

The court granted the writ of habeas corpus and ordered his discharge from segregation and the restoration of his visitation and phone privileges. See: *Collazo-Leon v. U.S. Bureau of Prisons*, 855 F. Supp 530 (D Puerto Rico 1994).

Atty. Fee Awards Analyzed

Larry Jones is an Arkansas state prisoner. He filed suit against various state prison officials claiming deliberate indifference to his serious medical needs, use of excessive force by guards and inadequate staff supervision. The case went to trial and a jury found in favor of Jones but awarded him only \$1 in compensatory damages and \$1 in punitive damages. Jones' attorney sought \$31,540 in attorney fees. The district court awarded

\$25,000 in attorney fees. The court found that Jones had prevailed on his claims that prison officials had physically abused him and had denied him adequate medical care.

The defendants appealed and the court of appeals for the eighth circuit affirmed in part and remanded the case to the lower court with instructions to reduce the fee award to \$10,000. The defendants conceded that Jones was the prevailing party in the case but urged the court to apply the supreme court doctrine announced in *Farrar v. Hobby*, 113 S. Ct. 566 (1992). In *Farrar* the court had disallowed \$288,000 in attorney fees where the plaintiff recovered only \$1 in nominal damages.

The appeals court applied the analysis used by Justice O'Connor in her concurring opinion in *Farrar*. To determine whether a civil rights plaintiff has won more than a technical victory a reviewing court should examine: "1) the difference between the amount recovered and the damages sought; 2) the significance of the legal issue on which the plaintiff prevailed; and 3) any public goal or purpose the litigation might have served." Applying that criteria, the court found Jones was entitled to attorney fees in this case finding that the amount sought, \$860,000, and the amount recovered, \$2, paled in comparison that in *Farrar*, \$17,000,000 sought, \$1 recovered. The vindication of the constitutional right to be free from cruel and unusual punishment is a significant legal issue in contrast to the injury to a private business interest alleged in *Farrar*. "Third, civil rights litigation serves an important public purpose; [a] plaintiff bringing a civil rights action does so not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest priority."

Other important features in this case are that the appointed counsel was competent and handled the litigation efficiently, the fee award did not constitute a "windfall" to counsel, and more importantly, punitive damages were awarded. The appeals court reversed the amount of attorney fees awarded holding the lower court abused its discretion in awarding \$25,000 in fees because Jones only prevailed on his medical claims and not the other excessive force claim. The case was remanded with orders to award \$10,000 in attorney fees. See: *Jones v. Lockhart*, 29 F.3d 422 (8th Cir. 1994).

MI DOC Creates Liberty Interest in Seg Release

Wendell Mackey is a Michigan state prisoner. He was found guilty of possessing contraband and assaulting another prisoner and placed in administrative segregation. After spending nearly one year in segregation, he was reclassified and scheduled to be released to general population. Citing a shortage of bed space, prison officials kept Mackey in segregation another 117 days before releasing him to population. Mackey filed suit under 42 U.S.C. § 1983 claiming that being kept in segregation after he had been approved for release violated his right to due process under the federal constitution.

The district court dismissed the suit holding that Michigan prison rules do not create a due process liberty interest for prisoners to be released from segregation. The court also held that Mackey had an adequate post deprivation remedy in Michigan state courts, remedies which would satisfy federal due process under *Parratt v. Taylor*, 451 US 527, 101 S. Ct. 1908 (1981). The court of appeals for the sixth circuit reversed and remanded, holding that Michigan DOC rules create a due process liberty interest for prisoners to be released from segregation.

The appeals court notes that prisoners have no federal due process right to either remain out of segregation or be released from it. However, such rights can be created by state prison regulations and enforced in federal court via § 1983. Analyzing Michigan DOC Rules 791.4401 and 791.4405 the court concluded that these rules created a due process liberty interest for Michigan prisoners to be promptly released from segregation once they are determined to no longer pose a threat to prison security. The court cites extensive sixth circuit authority dealing with segregation policies and previous rulings concerning Michigan's segregation policies.

Holding that Mackey had a liberty interest in being released from segregation, the court held that this right was well enough established in 1989 when the events at issue took place and that prison officials were not entitled to qualified immunity should Mackey prove his claims. Upon remand the lower court was instructed to make findings on the defen-

Liberty Interest (cont.)

dants' claims that there was a lack of bed space requiring that Mackey be kept in segregation past his release date. If the court finds that there was sufficient bed space, it must determine whether the defendants acted in a "willful and and wanton" manner because mere negligence would not support a finding of liability.

The court also held that the lower court had erred by finding that the existence of any Michigan state court post deprivation remedies would justify dismissal of the action. The court analyzed *Parratt v. Taylor*, 451 US 527, 101 S.Ct. 1908 (1981) and notes that it only allows for dismissal of procedural due process claims where an adequate post deprivation remedy is provided by the state. The lower court did not consider later supreme court cases which limit the application of *Parratt*. Furthermore, even if *Parratt* were applicable, the appeals court held that prison officials could easily have provided Mackey with a hearing to determine his segregation status and either reclassify him to segregation or immediately release him to population. Michigan readers will find this case of particular interest. See: *Mackey v. Dyke*, 29 F.3d 1086 (6th Cir. 1994).

Pro Se Litigants Subject to Rule 11 Sanctions

Lee Warren is a former Washington state prisoner. While confined at the McNeil Island Corrections Center (MICC) he claims he was assaulted by a staff cook. He filed suit under 42 U.S.C. § 1983 in US district court in Seattle in 1992. In his complaint, when asked by the court if he had "begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise related to [his] imprisonment," he answered "no." The district court approved his *in forma pauperis* application and ordered service on the defendants.

The Washington attorney general's office, Daniel Judge, responded, seeking dismissal of the suit because Warren had initiated an identical suit against the same defendants in 1989. That action was dismissed and Warren did not appeal. The

defendants sought summary judgment on *res judicata* grounds and also sought sanctions against Warren under Fed.R.Civ.P.11. Warren did not respond to either motion.

Fed. R. Civ.P. 11 provides for the imposition of sanctions when a motion is frivolous, legally unreasonable or without legal foundation. It requires that all papers submitted to the court be signed by at least one attorney of record in the case or by the party in the event they don't have counsel. By presenting a signed pleading or motion to the court, the attorney or party is "certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the defenses, claims and allegations have evidentiary support and are not frivolous. Should the court find a violation of Rule 11 it has no choice but to impose sanctions. The sanctions available range from directives of a non-monetary nature to fines and awards of attorney fees to the opposing party.

District court judge Carolyn Dimmick dismissed the second complaint with prejudice. With regards to the Rule 11 sanctions the court simply held that it declined to impose sanctions on a *pro se* plaintiff and did not make any finding as to whether Warren had actually violated Rule 11 in filing his second complaint. The defendants appealed and the court of appeals for the ninth circuit reversed and remanded.

The appeals court held that Rule 11 explicitly applies to *pro se* litigants. "The district court is therefore not at liberty to exempt automatically such persons from the rule's requirements. Secondly, Rule 11's express goal is deterrence: IFP litigants, proceeding at the expense of taxpayers, need to be deterred from filing frivolous lawsuits as much as litigants who can afford to pay their own fees and costs." Courts must take into account a *pro se* litigant's status when it determines whether the filing was reasonable. In imposing sanctions "... a court can properly consider a party's ability to pay monetary sanctions as one factor in assessing sanctions. It cannot, however, decline to impose any sanction, where a violation has arguably occurred, simply because plaintiff is proceeding *pro se*. A contrary conclusion would effectively place all unrepresented parties beyond the reach of Rule 11."

The case was remanded back to the lower court for a determination as to whether Warren's duplicate filings con-

stituted a violation of Rule 11. In the event it does, the court "may" impose sanctions. If it decides not to, it must provide a reasoned basis for its ruling in order to allow for meaningful appellate review. Readers will note that Rule 11 can also be invoked against attorney generals and government lawyers as well should they violate Rule 11's provisions. See: *Warren v. Guelker* 29 F.3d 1386 (9th Cir 1994).

Obtaining Prisoner Witnesses

This case involves an effort by state government defendants in a civil rights suit to obtain the presence of a witness to testify on their behalf. The case provides a useful discussion of writs of habeas corpus *ad testificandum*, whereby parties to civil or criminal actions can ask the court to produce a prisoner to testify in court. The case will be useful for *pro se* litigants seeking to obtain the presence of prisoner witnesses on their behalf.

28 U.S.C. § 2241(c)(5) and 28 U.S.C. § 1651(a) permit federal courts to issue writs of habeas corpus *ad testificandum*. The purpose of such writs is to direct the prisoner's custodian to produce the prisoner for appearance in court. The decision to issue such writs resides in the sound discretion of the court. The factors a court must consider are: (1) whether the prisoner's presence will substantially further the resolution of the case, (2) the security risks presented by the prisoner's transportation and safekeeping, and (3) whether the suit can be stayed until the prisoner is released without prejudice to the cause asserted. Courts should also consider any jurisdictional limitations arising from the prisoner's incarceration in a prison located in a state other than that in which the district court is located.

In this case, the suit was filed in district court in New York and the prisoner witness willing to testify for the police defendants was being held in a New Jersey state prison. The court cites several cases which allow courts to issue writs of habeas corpus *ad testificandum* to produce prisoners held in prisons outside the court's jurisdiction. The court granted the defendant's motion to produce the witness. See: *Atkins v. City of New York*, 856 F. Supp. 755 (ED NY 1994).

Court Orders Return of Disks

Charles Oropallo is a New Hampshire state prisoner. Pursuant to prison regulations, in 1991 Oropallo ordered a Smith Corona word processor with disk storage capacity. In 1992, prison rules changed, prohibiting the possession of "computers" with a memory storage capacity. As a result, his disks were confiscated by prison officials. In 1994 the New Hampshire state supreme court accepted Oropallo's petition for a writ of habeas corpus. Oropallo filed suit in federal court pursuant to 42 U.S.C. § 1983 claiming that the confiscation of his disks violated his right of access to the courts because the disks contained his pleadings, notes and other information needed to litigate his habeas corpus petition in the state supreme court. Oropallo sought a Preliminary Injunction (PI) seeking the return of some 60 disks.

The court noted that prisoners retain a constitutional right of meaningful access to the courts. Under the standard used in weighing petitions for PIs the court notes that a moving plaintiff must prove: 1) that they will suffer irreparable injury if the injunction is not granted; 2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; 3) the plaintiff has shown a likelihood of success on the merits; and 4) that the public interest will not be adversely affected by the granting of the injunction.

Using these standards the court granted Oropallo's motion for a PI. The court held that Oropallo's state court proceedings were at a critical juncture and that if the disks were not returned to him he would suffer irreparable harm. The court ordered prison officials to return 12 of the 60 disks, which the court had examined and held relevant to the action, holding that Oropallo had shown a likelihood of success on the merits. The court's order was that prison officials had to allow Oropallo to print out the entire contents of the 12 disks in question after which the disks would be returned to the court and the court would release them to one of Oropallo's representatives. See: *Oropallo v. Ackerman*, 856 F. Supp 35 (D NH 1994).

Women Prisoners Entitled to Equal Education

This is a precedent setting case that should be read and studied by women prisoners who are denied educational opportunities comparable to those offered to male prisoners. This ruling applies to state prisons who receive federal funding and who provide educational programs. Since virtually all state prison systems do both, this ruling has a wide ranging significance and impact. In 1984 women prisoners at the Oregon Women's Correctional Center (OWCC) filed a class action suit claiming sex discrimination in educational and vocational training programs in the Oregon prison system: prison industries, a forest camp, a farm annex, apprenticeships, vocational programs and college courses. They filed suit under Title IX and its regulations, 20 U.S.C. § 1681, 45 C.F.R. § 86.1 and the equal protection clause of the fourteenth amendment. After a bench trial the district court ruled against the prisoners on all but one claim. They appealed and the court of appeals for the ninth circuit reversed and remanded. Addressing the merits of the case, the appeals court held that Title IX applies to prisons, which is the first ruling of its type from an appeals court.

Title IX holds that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination from any education program or activity receiving Federal financial assistance..." The Oregon prison system receives federal financial assistance.

The lower court found that OWCC offers two vocational classes while two male prisons offer 12. There are no apprenticeship programs at OWCC but they may participate in some at a nearby male prison but may not participate in mechanical trade apprenticeships. The lower court essentially held that Title IX does not apply to prisons and that any gender based classifications were due to "legitimate penological interests" rather than discrimination. The court did hold that Oregon prison officials had violated Title IX by paying male prisoners, but not female prisoners, to attend vocational classes. The lower court entered judgment in plaintiff's favor on this issue and awarded attorney fees.

The appeals court gave an extensive history and analysis of Title IX and how

it applies to prisoners. Until now, only two other courts had held that Title IX applies to state prisons receiving federal funding, see: *Canterino v. Wilson*, 546 F. Supp. 174 (WD KY 1982) and *Beehler v. Jeffes*, 664 F Supp. 931 (MD PA. 1986). The court held it applies to prisons because the statute lists several exemptions, i.e. religious and military schools and prisons aren't among them. "The statute, the case law, and the legislative history all suggest that Title IX should apply to prisons, there is no contrary authority. Thus, although the application of Title IX's requirements must be analyzed in the context of the prison environment, state prisons which receive federal financial assistance are bound by the mandates of Title IX."

In analyzing the language of Title IX the court held that it requires equality for female prisoners in terms of the educational opportunities they receive. The court compares the protection women prisoners receive under Title IX compared to directly under the constitution, Title IX provides greater protection because the constitution only requires "parity" rather than equality. Equality requires the state "to offer equivalent programs in form as well as substance." The court gave a lengthy discussion to the practical and philosophical underpinnings of its ruling to apply Title IX to prisons but left it up to the lower court to determine how, on remand, it should be applied to Oregon's farm annex, forest work crews and prisons.

Gender integrated classes are not required in prison. Thus, exclusion of women from a particular educational program because women do not reside at that prison does not violate Title IX. "The prohibited activity would be the offering of educational programs only in the men's prisons, without offering equivalent programs in the women's prison. In that case, women would be 'denied the benefits of a program' on account of sex."

"Strict one for one identity of classes may not be required by the regulations. But there must be reasonable opportunities for similar studies at the women's prison and women must have an equal opportunity to participate in educational programs. For example, the apprenticeship programs offered to men and women could perhaps differ depending on inter-

Women Prisoners (cont.)

est and need, but totally denying women access to half the apprenticeship opportunities men have would seem to violate the regulations. In this case, women were denied access to all of the mechanical trade apprenticeships. And facilities such as labs, classrooms, and workshops must be comparable to each other."

Prison officials may not need to offer as many classes in a small women's prison as they do in larger men's prisons, but the number of classes offered should be proportionate, not just to the total number of prisoners, but to the number of prisoners desiring to take educational programs. Prisoners must be made aware of the opportunity for participation in various programs before their needs can be assessed. "In order to give women 'equal opportunity,' there may need to be a higher number of courses offered so that women have comparable variety in course selection." The court emphasized that its role is not to decide or define what programs must be offered, only to define the boundaries of what is required by Congress and the constitution. "It is clear to this court that state prisons receiving federal funds are required by Title IX to make reasonable efforts to offer the same educational opportunities to women as to men. Although the programs need not be identical in number or content, women must have reasonable opportunities for similar studies and must have an equal opportunity to participate in programs of comparable quality."

The appeals court specifically held that "penological necessity is not a defense to Title IX. Rather, it is just one concern to be considered in how the equality principles of Title IX are to be applied in prison. Our holding that Title IX does not require co-educational classes in prisons satisfies most of the legitimate security concerns. And we disagree with the district court that efficiency and cost effectiveness are valid security concerns. They are cost and management concerns which must be applied consistently with the requirements of Title IX. We agree with the *Canterino* court that the requirements of Title IX can be carried out 'without compromising any valid correctional concerns over security, order and discipline.'"

The court remanded all of the plaintiff's Title IX claims back to the lower

court for consideration. In ruling on the defendant's cross appeal, the court affirmed the lower court ruling holding that paying men but not women to attend vocational courses violated Title IX. Because it affirmed the ruling it also affirmed the award of attorney fees to the plaintiffs on this issue. The court declined to rule on the constitutional issues involved in this case, i.e. whether the practices complained of violate the equal protection clause of the constitution, because the matter was resolved solely on statutory grounds. See: *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994).

Women Prisoners Lose Equal Protection Suit

In the December, 1993, issue of *PLN*, we reported on *Klinger v. Nebraska Department of Corrections*, 824 F. Supp. 1374 (D Neb. 1993) which had resulted in a significant victory for Nebraska's female prisoners who had filed a class action suit claiming they were denied equal protection of the law with regards to the services they were provided when compared to those provided to male prisoners. The court of appeals for the eighth circuit has reversed the lower court ruling.

After extensively ruling in the plaintiff's favor, the court allowed the defendants to file an interlocutory appeal after a trial in which the court found the defendant prison officials had violated the female prisoners' equal protection rights in over a dozen different areas. The appeal involved three controlling questions of law for the appeals court to decide: (1) were female prisoners at the Nebraska Center for Women (NCW) similarly situated to male prisoners at the Nebraska State Penitentiary (NSP) for purposes of the equal protection clause regarding the programs and services challenged by the plaintiffs? (2) Did the lower court correctly determine that "heightened scrutiny" as opposed to a "rational basis" scrutiny level of review was appropriate to the plaintiffs' equal protection challenge, if so, did the court correctly apply the "heightened scrutiny" to the facts in the case? (3) Did the court correctly determine that the equal protection clause requires the Nebraska DOC to provide programs and services to female prison-

ers that are "substantially equivalent" to or in parity with the programs and services provided male prisoners at the NSP, if so, did the court correctly apply this standard to the acts?

The equal protection clause requires the government to treat similarly situated persons alike. In the context of prison litigation, equal protection claims, whether by female or male prisoners, have rarely succeeded because courts usually accept claims by prison officials that, for all practical purposes, no one is "similarly situated" in prison. That is what happened in this case. The appeals court held that because the plaintiffs did not allege inadequate funding for programs at NCW they could not challenge how the DOC used its resources in providing services for prisoners "...we hold that NCW inmates and NSP inmates are not similarly situated for purposes of prison programs and services." The court reached this conclusion because NCW is the smallest of Nebraska prisons, the NSP houses about six times as many prisoners as NCW, has a higher security level with prisoners staying there longer, on average. The court concluded that differences in treatment were the result of DOC decisions made on different sets of circumstances "Thus, whether NCW lacks one program that NSP has proves almost nothing."

The appeals court concluded that the plaintiffs had failed to make the requisite threshold showing that they were similarly situated to the group (i.e. male prisoners at NSP) they claimed to receive favorable treatment. "For this reason, the plaintiffs have not suffered an equal protection violation because their programs are allegedly inferior to those that male inmates at NSP receive." This finding essentially puts an end to the plaintiffs' lawsuit. The court held that even if the female plaintiffs were "similarly situated" to NSP prisoners, they would still have to show they were victims of intentional discrimination with regards to the programs they received, in order to prevail. The court further held that because no Nebraska statute distinguishes between male and female prisoners there is no issue of facial gender discrimination. The court reversed the lower court order finding the defendants liable for violating the plaintiffs' equal protection rights and dismissed the suit.

Judge McMillian filed a detailed dissent which states that the majority "arti-

ficially manipulated" the equal protection clauses "similarly situated" requirement in order to dismiss the suit. He gives a detailed opinion as to how and why the majority opinion is in error and why the lower court ruling should be affirmed, citing extensive equal protection cases. See: *Klinger v. Nebraska Department of Corrections*, 31 F.3d 727 (8th Cir. 1994).

S.Ct. Grants Review in Prison Disc. Case

On October 7, 1994, the US Supreme Court announced that it had granted certiorari in *Sandin v. Conner*, Case No. 93-1911. The case involves a Hawaii state prisoner who was incarcerated and found guilty of praying in Arabic. The district court dismissed the case and the court of appeals affirmed in part, reversed in part at 994 F.2d 1408 (9th Cir. 1993). See: *PLN*, Vol 4, No. 12. The ninth circuit reheard the case and concluded that Hawaii prison rules create a liberty interest for prisoners to remain free from disciplinary segregation. The rules also require "substantial evidence" before a prisoner can be found guilty of an offense. It then held that prison officials had violated Conner's rights by denying his requests for witnesses at the disciplinary hearing. It also held prison officials were not entitled to qualified immunity for their actions. See: *Conner v. Sakai*, 15 F.3d 1463 (9th Cir. 1994); *PLN*, Vol 5, No. 7.

The prison official defendants in the case appealed to the supreme court. The question which the supreme court will rule on is: "Does maximum security state prison inmate who is not subject to loss of good time credit or to any necessary impact on parole, but who 'may be' subjected to disciplinary segregation for violation of prison rules, have 'liberty interest' in avoiding disciplinary segregation solely because state prison disciplinary rules require disciplinary committee to find 'substantial evidence' of rule infraction before deciding whether and to what extent to order inmate segregated?"

It is interesting to note that with its docket at the lowest it has been in more than 40 years, the supreme court will hear at least two prison and one parole case this term, compared with only one prison case last term. *PLN* reports all supreme court decisions affecting prison litigation.

VA Repressive Sentencing Law Results in Uprisings

by Dan Pens

The feature attraction in this summer's media/political crime-hype circus in Virginia was the coverage of "Proposal X," Republican Gov. George Allen's repressive new sentencing bill. The bill, signed into law by Allen on October 17th, 1994, calls for tougher sentencing, the abolition of parole, and the construction of 22 - 25 new prisons to warehouse the expected tripling of Virginia's current prisoner population (20,000) over the next ten years.

The new sentencing law, which will take effect January 1, 1995, increases sentences by 100% for violent first-time offenders and 300%-700% for repeat offenders. Citizens convicted under the new law will serve a minimum of 85% of their sentences. In order to qualify for even a 15% time cut, prisoners will be required to participate in "rehabilitation" programs, though legislators failed to earmark any money to fund such programs. In fact, the 140 member state legislature approved only \$36 million to fund the bill.

Gov. Allen, when asked by reporters at the signing ceremony, was unable to explain where the money will come from to finance the estimated \$2.2 billion required to implement the bill's provisions. When pressed, Allen said he can generate some of the funds from budget cuts and selling surplus state lands. The "budget cuts" would almost certainly severely impact state funding for education and transportation. These fears were echoed in a statement issued by 22 pastors, rabbis, bishops, and other church officials in Virginia. They said the plan's "exorbitant costs will mortgage our children's future and rob us of the resources needed to address the underlying causes of crime."

When the legislature returns in January, lawmakers will look at issuing general obligation bonds for specific prison construction projects, each to be approved by voters. The first bond referendums are expected to appear on the November, 1995 ballot. It's ironic that state politicians cash in on the rich "political capital" garnered by passing a fashionable "get tough on crime" bill, but leave the responsibility for raising the financial capital to the already tax-strapped state

voters. It will be interesting to see if (and how) voters will be goaded into putting their money where their politicians' mouths are. And what will state politicians do if the voters balk on the bond issues?

The state's leading Democrat, Lt. Gov. Donald S. Beyer—not to be outdone by his Republican counterpart—proposed that the bill should retroactively abolish parole for all prisoners already in the state's gulags. Virginia State Attorney General, James S. Gilmore, issued an opinion stating that retroactively abolishing parole would most certainly violate the federal constitution's prohibition against imposing *ex post facto* laws. Beyer then announced that his proposal could be accomplished by revising current parole and good-time guidelines, making it next to impossible for current prisoners to be paroled.

As is often the case when the political winds fan the flames of crime-hysteria to dizzying heights, professionals within the "corrections" industry start to get a little edgy. They know the score. There is usually a price to be paid when the boot presses down too hard on prisoners' necks. One week before Proposal X was to be voted on, the warden of the prison at Powhatan, VA ordered the prison locked down because a "kitchen knife disappeared." At about the same time the prison at Nottoway, VA was put on lock down status because of a "suspected plot" by prisoners to kill a guard.

A few days later Frank E. Saunders, a retired prison administrator in Richmond, was quoted in a Virginia newspaper article saying, "If you don't give them [prisoners] any kind of a sentence that offers any hope at all, this state is going to be one riot after another. And I predict that before the summer is over, after this parole commission has their meeting [to tighten current parole guidelines], there will probably be a series of riots throughout the state."

On September 19th, four days after that news article appeared, the legislature met in a special session to vote on Proposal X. On that same day prisoners at the Greensville prison in Jarratt Va. revolted. Numerous fires were started, equipment destroyed, surveillance cameras trashed,

VA Sentencing (cont.)

and fences torn down. Prisoners controlled several buildings and the recreation yard for several hours. The Prison Emergency Response Team (PERT) launched a counter assault, pumping tear gas, brandishing clubs and using attack dogs, eventually regaining control of the prison about five hours after the revolt started. The same day, prisoners at the overcrowded Norfolk jail rebelled, setting fires and trashing the place. It took jailers about five hours to quell that uprising.

Incredibly, prisoncrats and the mainstream media played down both disturbances and tried to assure the Virginia voters the rebellions had nothing whatsoever to do with the special session of the legislature voting on Proposal X *that same day!* Gov. Allen said the Greenville riot was "no big deal." And State Public Safety Secretary Jerry Kilgore said it "did not cause any damage to speak of." Prison spokesman Wayne Brown said it was "unclear if the legislative action triggered the disturbance."

Norfolk County Sheriff spokesman, George Schaefer, claimed that prisoners in the jail rioted because "they were upset about the food." He went on to assure reporters that there was "no apparent relation between the jail disturbance and the parole [Proposal X] issue."

But a 10-year veteran guard at the Greenville prison, who insisted on anonymity, said that tensions have been mounting at the Greenville prison and other prisons in the state ever since Gov. Allen's Proposal X was first publicized. The guard said of the disturbance, "It's long overdue, and it's going to happen again and again" at other prisons.

As of this writing, a *PLN* reader at Greenville reports that prisoners are still locked down 24 hours a day. They were not allowed to shower until ten days after the rebellion even though many of them had been heavily exposed to thick smoke and tear gas. All work, educational, and recreational programs have been halted. Visitation and phone calls have been suspended indefinitely. There is no sick call. The law library is closed, and photocopying is allowed only for "verifiable pending legal issues with a deadline within 30 days." The photocopying of legal documents is done by the Deputy Warden. Prisoners cannot buy food or tobacco items from the commissary, only hygiene

items, stamps, and writing materials can be purchased.

The fact that Virginia DOC and prison officials would want the prisoner rebellions downplayed in the press and portrayed as unrelated to the crime bill is understandable. Proposal X will initiate the construction of 22 - 25 new prisons. That will result in the creation of huge numbers of "corrections" jobs. Those currently employed by the DOC will enjoy a tremendous opportunity to advance their careers quickly. During the prison expansion, as the DOC swells its ranks, avenues for promotion will quickly open up.

It is understandable that the press would downplay the prison rebellions. After all, they are in the business of gathering news. "News" is not that easy to come by. Most of the "news" they get is dispensed to them at press conferences by government officials. No prisoners were interviewed or quoted by the mainstream press in any of the numerous articles we reviewed leading up to and after the prisoner rebellions. If government spokespersons want to give a certain "spin" to a story, that is exactly the version of events they dispense to the news hounds who come to them for their daily ration. The news hounds know better than to bite the hand that feeds them.

It is also easy to grasp why the media is so fond of hyping crime. Ratings. Circulation. The media is in the business for profit. They have to compete with each other. They have discovered that whether or not the threat of rising crime is real (as they know it is not!) the more shocking and hysterical their coverage of crime becomes, the more they out-sell the competition.

It's not surprising that the public is scared witless and clamoring to rid themselves of crime and criminals. It is also not surprising that people consume the crime-hysteria peddled to them by the media. They are afraid. But what they fail to understand is that fear itself is a narcotic. They gulp down crime stories the way an alcoholic gulps down a bottle of cheap wine, seeking solace in the media, not understanding that the "news" they so desperately seek is the very source of their unrealistic fears in the first place.

With the voters whipped into a crime-fear frenzy, it's no wonder that local, state, and national politician's jump on the crime-wagon. Their constituents almost demand they pass draconian crime legis-

lation. It's a simple way for politician's to get voters lined up behind them. "Criminals" and prisoners have no special interest PACs to oppose legislation like Proposal X. By focusing attention on the "crime" issue, politicians capitalize on (and further inflame) the voting public's fear of crime. At the same time they are able to deflect attention away from the failings of government in other critical areas such as education, health care, and unemployment.

All of the above are isolated viewpoints, separate threads of a larger cloth. Each thread, when examined by itself, can appear to make some kind of sense. But when all of them are woven together into the fabric of society, the resulting garment appears more and more like a straight jacket.

Fast Food Style Death Penalty Defense

Harris County, Texas, which encompasses Houston, is the death-penalty capital of the U.S. [See: *Houston, Death Penalty Capital of USA on page 15 of this issue*]. What better place for a lawyer to develop and market the same techniques that made fast food a commercial success in this country?

Joe Frank Cannon, acting as a court-appointed attorney, has "defended" eight men who currently await execution in Texas, two other former clients have already been put to death. His strategy for those capital punishment cases is simple: work fast.

"Juries don't like a lot of questioning, all of these jack-in-the-box objections, going into every little detail, so I've never done it," explains the veteran lawyer. He openly boasts of hurrying through trials like "greased lightning."

Harris County judges are elected by popular vote, rather than being appointed to the bench. The judges have complete control over appointing and supervising attorneys in death penalty cases. Some judges, concerned about budgets and docket backlogs, appoint attorneys who are known for trying cases rapidly rather than zealously. District Judge Miron Love has said, "The number of death penalty cases currently pending could

cost taxpayers a minimum of \$60 million."

Mr. Cannon discovered that by working as fast as possible, he could gain more appointments from those judges worried about budgets and crowded dockets. He has in fact explicitly marketed his fast approach to trying murder cases.

Veryl Brown, a former Harris County prosecutor, swore in a 1988 affidavit filed in the Houston federal district court that four years earlier, he had witnessed a conversation between Cannon and then-Judge Joseph Guarino, in which Cannon asked to be appointed to the capital murder trial of Jeffrey Modey. "Mr. Cannon represented to the judge that if he was appointed he could have the case completely tried within two weeks," Mr. Brown stated in his affidavit. Cannon was subsequently appointed to the case, which was tried in 19 days and resulted in a death sentence.

Candelario Elizondo, a past president of the Harris County Criminal Lawyers Association, swore in a 1988 federal court affidavit that it is "generally reputed in the Harris County legal community" that Mr. Cannon received capital appointments "because he delivers on his promises to move the courts' dockets."

In a how-to article written by Mr. Cannon years ago, he scorned death penalty defense attorneys who "slavishly 'follow the book' for weeks or months" in the courtroom. To illustrate his fast food approach to capital defense, he pointed to the 1981 case of Willie Williams. With relatively light questioning by Cannon and his junior co-counsel, a jury was selected in just five days - three or four times faster than was, or is, typical in the Harris County Courthouse. The trial consumed only parts of two days. After deliberating for only four hours, the jury returned a death sentence.

As America watches with fascination how the criminal justice system works in the O.J. Simpson murder trial, they will see a rich defendant buttressed by the best attorneys that money can buy. Most people fail to realize that the vast majority of defendants in death penalty cases are too poor to retain their own attorney. They must rely on whatever defense is put up by the attorney appointed to them defense by the court. In Texas, these publicly paid attorneys receive only a modest fee, just \$10,000 for a typical murder trial, or up to \$40,000 for one that lasts several months.

Stephen Bright, an Atlanta based capital-punishment defense expert, wrote in the *Yale Law Journal* that "Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources and commitment to handle such serious matters." Citing court records, he gave several examples including:

- An Alabama lawyer who was so drunk during a capital trial that the judge found him in contempt and sent him to jail. After a day's delay, the lawyer returned, the trial proceeded and the death penalty was imposed.
- A Georgia lawyer who missed key testimony of a witness he subsequently cross examined because he was outside the courthouse parking his car.
- Attorneys from Texas and elsewhere who, in front of juries, referred to their clients as "niggers" or "wet backs."

Mr. Cannon, now 75 years old, has been known to sleep in court during more than one of his capital murder trials. He denies this, but the allegations are supported by affidavits from, among others, a former assistant who at the time of the trial was only a few weeks out of law school. Appellate lawyers trying to have the 1984 conviction of Calvin Burdine overturned noted that Mr. Cannon's case file contained only three pages of handwritten notes. Cannon asserts that the appellate attorneys intentionally lost or destroyed the rest of his notes, though he concedes that "nobody would believe me."

In the Burdine case, Cannon made plain legal blunders. In one meandering cross examination of a police detective he opened the door to otherwise inadmissible testimony portraying his client as the leader, rather than the follower, in a two-man robbery that resulted in murder. "It was an incredible blunder, which there is no justification for," says Randy McDonald, a former prosecutor who defended Burdine's crime partner. Burdine is now on death row. His partner, even though evidence indicated he was responsible for at least one of the fatal knife thrusts, got a 40-year sentence.

Critics point to sloppy work on vital legal procedures in other cases tried by Cannon. Consider the case of Carl Johnson, now on death row, who was another Cannon client. Johnson was convicted of robbing a convenience store and fatally shooting a security guard, who had

fired his weapon at Johnson first. Johnson claimed he pulled the trigger only out of reflex and didn't mean to kill. But Mr. Cannon failed to inform jurors that they could spare his life if they found his actions to be a "reasonable" response to provocation.

In its opinion reviewing the case, the Texas Court of Criminal Appeals said unequivocally that the evidence "raised the issue of provocation" and that the trial judge should have explained this potentially life-saving point to the jury. Ordinarily such a clear mistake would be grounds for setting aside a death sentence. But because Mr. Cannon failed to mention the concept of provocation at trial, the court said, Mr. Johnson was barred from bringing the issue up on appeal.

Harris County continues to try capital murder cases at a record pace. Although Mr. Cannon is no longer taking capital murder cases, his low-budget, fast food approach to trying cases must still be used by his successors. How else can Harris County try capital cases at such a record setting pace? Maybe they should put a sign out front of the courthouse that says "33 Fried So Far." But maybe their already strapped budget would not be able to support the labor incurred changing the numbers on the sign every time the executioner fries a new victim.

Source: Wall Street Journal, 9/7/94

Houston - Death Penalty Capital of USA

by Dan Pens

In one week this September, six separate capital murder cases were being tried in Harris County, Texas, of which Houston is the main city. Some legal observers consider this to be a national record.

"They may have done this in the Old West, but there's been nothing like this in modern times," said a law professor at the University of Houston. The six capital murder cases being tried in one week in Houston are more than any other Texas county tries in one year. Dallas County, which encompasses Dallas-Fort Worth, has only tried one capital murder case so far in 1994. In Harris County the number will be 22 or 23.

District attorney, John B. Holmes, Jr., who has been referred to as the "killingest man" in America, vows to continue his killing ways. "I am not about to alter my rigid views on capital justice, and if the

public doesn't like it, they know what they can do about it."

As of September, 1994, there have been a total of 251 state sponsored murders [executions] in the U.S. since the United States Supreme Court reinstated the death penalty in 1976. Since then the State of Texas has murdered 80 of its citizens. That's 32% of all US executions since 1976! (Texas didn't resume executions until 1982) Of the 80 put to death in Texas, Harris county proudly claims 33. Serial killer John Wayne Gacey, also of Houston, took the lives of 33 young men and boys, which means that District Attorney Holmes should soon eclipse him as Texas' all-time mass murderer! Currently there are 394 people on death row in Texas, 111 were tried in Houston.

These figures clearly make Texas the leading state murderer in the US, and Houston [Harris County] has the distinction of leading any other county in Texas. If you are put to death by the Government in this country, there is a better than one-in-ten chance that your case was tried in Houston, Texas!

The practice will probably continue, or even accelerate in the years to come. Former Texas Governor, Ann Richards (D), never issued a death-row pardon. The new Governor, George W. Bush, son of the former President, is a staunch supporter of the death penalty. Both candidates called for "speeding up" the appeals process in death penalty cases, presumably so the state can murder its citizens faster and with less "interference" from federal courts.

Death Penalty Deterrents?

Former California Governor Edmund "Pat" Brown, in his book, *Public Justice, Private Mercy*, recounts how a plumber convicted of robbery was among the prisoners who built California's gas chamber at San Quentin. He helped to install it and watched test pigs die as the chamber's effectiveness was tested.

That experience did not seem to have much of a deterrent effect. Within a year after being paroled the plumber committed murder, was sentenced to die and in a rather ironic twist, met his death in the gas chamber he helped build.

From the Editor

By Paul Wright

Welcome to another issue of *PLN*. Everyone at *PLN* would like to extend our thanks to the Peradam Foundation for their generous grant to *PLN* of \$3,900 which will enable us to buy computer equipment necessary for the magazine's production. As everyone knows, computer equipment is expensive and until now we have relied on our volunteers who own their own computers. By being able to purchase a computer this allows us to expand the number of people involved in *PLN*'s production; this spreads the work around and also helps ensure we aren't reliant on just one set of equipment should there be an equipment failure or such. How we came to receive the grant from Peradam is a long story. They contacted us to see how they could help after learning that Resist had turned us down for a grant because of our political content.

At this point *PLN* is the only national prisoner-produced magazine in the US. As the political climate goes further towards the right prison struggle is not a very popular topic, especially for funding purposes. Besides the Peradam Foundation's grant *PLN* has only received two other grants, despite having applied to a number of foundations in the past. Both grants were from Resist. In 1991 Resist gave us \$600 which allowed us to get our non-profit status and bulk mail permit. In 1993 they gave us \$800 which allowed us to absorb the costs involved in expanding from a 10 page newsletter to a 16 page magazine. Earlier this year we applied for a \$1,000 grant to Resist to fund an outreach campaign where we could mail out around 4-5,000 copies of *PLN* to potential institutional subscribers.

Resist declined our grant request because of several articles that have appeared in *PLN* over the years which are sympathetic to or otherwise supportive of the PCP (Communist Party of Peru, AKA the Shining Path). In turning us down they stated: "The Board is generally supportive of your newsletter. After much discussion, however, Board members decided against funding your proposal. The Board was opposed to contributing to a group that continues to be supportive of the Shining Path. Because there is no longer just one article on the Shining Path, but a series of articles, replies, and

so on, Board members could not see that future issues of the newsletter would be any different. At the same time that the Board is not interested in monitoring or in anyway controlling the production of your newsletter, your continued support for the Shining Path makes it impossible for Resist to provide funding for the newsletter."

We wrote to Resist and asked them to reconsider their decision. As of today's date we have not received a reply. In 1992 we requested a grant from Resist, which they declined to provide also based on the PCP articles. They later changed their mind and in 1993 wrote us and requested that we resubmit our grant request, which we did and they granted it. (Anyone desiring copies of the relevant correspondence should send me an SASE.)

Based on Resist's letter I went through all back issues of *PLN* from January, 1993, to the present (at that time our August issue). In 20 issues *PLN* had published 6 articles dealing with Peru in general, this included prisoners at Leavenworth organizing in support of PCP prisoners, a prison escape in Peru, lawsuits against the Peruvian government filed by American lawyers on behalf of PCP prisoners, the persecution of Peruvian lawyers and a letter from a reader concerning allegations he had heard that the PCP persecuted gays (they don't). This is hardly the "series of articles" Resist states is the case, especially when you consider that each issue of *PLN* has between 30 and 40 articles. So 6 articles out of several hundred during the relevant time period is what Resist objects to.

But this raises two important issues. First, is the coverage of struggle by political prisoners around the world. Since we began *PLN* we have consistently focused on struggle by and around political prisoners, whether in Palestine, Ireland, England, France, Spain, Central America, Mexico, the US and yes, even Peru. *PLN*'s co-founder and former editor Ed Mead was himself a political prisoner. We have covered political prisoner issues because many countries deny having them and it is important that people know the reality. Covering people's struggle for a better world, which invariably results in those militants being killed and imprisoned, is what sets *PLN* apart from other magazines that focus on prison reform

without putting it into the context of the need for radically changing society. We will continue to cover and support the struggles of political prisoners around the world. For what its worth, in nearly five years only Resist has complained about our coverage of this type of struggle.

Secondly, this episode illustrates the importance of *PLN* remaining financially independent. By not relying on foundations, advertising, etc. for survival we are able to maintain our editorial independence and continue publishing the materials that our readers need to know about and which serves the interest of advancing the progressive prison struggle. This means we remain answerable to you, our readership, rather than a few big money donors whose interests or agendas may be in conflict with that of progressive prison struggle. To remain financially independent we rely on the donations that you, our readers, send us. We are doing our outreach mailings but can still use money to cover the costs of the mailings. If you can send a donation to help us do so, send what you can.

It was due to Resist turning down our grant request that the Peradam Foundation learned of us and was able to so generously donate.

Our subscription drive continues. We were just hit with a postage increase in November and postal rates will be going up again in January, 1995. Over the years we have cut our costs as much as we can. In almost five years we've increased our suggested donation rate only once, from \$10 to \$12, and in that time we have doubled in size from 10 to 20 pages. The only way we can break even and keep from having to raise our rates is by increasing our circulation. The higher our print run is (i.e. the more subscribers we have) the cheaper it is per copy. We have about 1,200 readers now. Please tell others about *PLN* and encourage them to subscribe. We can send bundles of *PLN* for you to pass along to potential subscribers and we can send sample copies on request. The main thing is to get the word out and let folks know about *PLN* so they can subscribe. We need and appreciate your support on this.

The *PLN* suit against the Washington parole board [See: July, 1994, *PLN*] also continues. Judge Bryan of the US District Court in Tacoma denied the state's motion to dismiss the suit on the basis that it

should be brought as a habeas corpus action. We will be filing for a Preliminary Injunction before this issue goes to press. We will advise readers of the outcome once the court has ruled on it. The suit has gotten local publicity with an excellent article by Dan Tenenbaum and George Howland appearing in *The Stranger*, a weekly alternative paper in Seattle.

On a closing note, Erwin Knoll, the editor of *The Progressive*, died of a heart attack on November 2, 1994. Mr. Knoll was one of *PLN*'s first subscribers way back in 1990. Over the years he was also a strong supporter of the first amendment and press freedom. When prison officials at Clallam Bay punished me for writing a series of articles about guard brutality at the prison Mr. Knoll wrote about it. One of his last editorials covered the *PLN* suit against the parole board. Mr. Knoll became famous in 1979 when the government tried to stop *The Progressive* from publishing an article about making hydrogen bombs. The government ultimately lost their suit. With his passing *PLN* and free speech advocates everywhere have lost a friend. We send our condolences to Mr. Knoll's family and the staff at *The Progressive*.

One and Two Strike Laws Passed

By Paul Wright

In the June, 1994, issue of *PLN*, my article "Three Strikes Racks 'em Up" made reference to then pending proposals to pass a "Two Strikes" law in Georgia and a "One Strike" law in California for sex offenders. I am sad to say that both laws passed. (The federal government recently passed a "three strikes" law of its own in Clinton's vaunted "crime bill" but that piece of legislation is the subject of the cover article of this issue.)

On September 1, 1994, the California legislature passed its "One Strike Rape Bill." As originally drafted by Republican state senator Marian Bergeson the law required that nearly all sex offenders be sentenced to life in prison without the possibility of parole. Critics immediately attacked the law as so harsh that it might prompt rapists to kill their victims. The version finally approved, which was signed into law by Republican Governor Pete Wilson who made this law a major part of his re-

election campaign, calls for a penalty of 25 years to life for sexual assaults involving torture, kidnapping or burglary with intent to commit rape. Lesser sex offenses would have sentences of fifteen years to life.

Under California's current sentencing laws a single rape conviction involving a weapon nets an eight year sentence with the prisoner usually released after five years or less. The same offender sentenced under the one strike bill will spend nearly 13 years in prison and then be freed only by the decision of a parole board. Those sentenced to the maximum term of 25 years to life will not be eligible for parole for more than 21 years.

The California DOC has not yet determined what impact this new law will have on prison capacity. According to the *Corrections Yearbook*, as of August 1, 1994, the CDC was the most overcrowded prison system in the country, operating at 185.8% of its rated capacity. (Ohio, which in 1993 had the dubious distinction of "most overcrowded" was pushed into second place, operating at 179.6% of its rated capacity.) The "one strike" bill is touted as being the harshest in the country. One prosecutor was quoted as saying its purpose was to make sex offenders "stop, leave the state or be locked up." What effect this will actually have on crime rates remains to be seen. Likely, it will be little or none.

Georgia's Democratic Governor Zell "Zig-Zag" Miller, also up for reelection, signed that state's "two strikes" law into effect in April, 1994. Actually, according to the *Atlanta Constitution*, he signed the law into effect no less than seven different times at different sites around the state while campaigning. Among the law's provisions are sentences of life without parole for any person found guilty of specific crimes who already has one prior offense. The law also gives mandatory minimum sentences of ten years to first time offenders and treats juveniles offenders as adults. The Georgia legislature voted 166-7 in favor of the law. For the moment Georgia can lay claim to having the most punitive prior offender law on the books. Given the national stampede towards draconian punishment it may not hold this distinction for long. [Editor's Note: Georgia's two strikes law was also approved by voters on Nov. 8, 1994.]

PI Issued for Prisoner Transfer

Elmer Geronimo Pratt is a political prisoner in the California state prison system. A former Black Panther imprisoned since 1972, Pratt has achieved prominence by vigorously claiming his innocence and that he was framed by the FBI for a murder he did not commit as part of the agency's notorious COINTELPRO (Counter-Intelligence Program). In the past, Pratt has successfully sued California DOC (CDC) officials for retaliating against him for exercising his first amendment rights in prison.

In 1991 the federal court issued an injunction prohibiting prison officials from retaliating against Pratt or taking other reprisals against him for exercising his first amendment rights, his right to seek legal redress in the courts, his political beliefs or his media attention.

On December 17, 1993, a Los Angeles television station requested to interview Pratt at the Donovan Correctional Facility. Pratt declined but a few days later changed his mind. On December 24, 1993, the Director of Corrections, James Gomez, personally ordered Pratt transferred to the Mule Creek State Prison. On December 27, Pratt was interviewed by the LA TV station. That program, discussing his case, was aired in three parts January 3, 4 and 5, 1994. On January 7, Pratt was transferred from Donovan to Mule Creek. Upon arrival Pratt was placed in segregation and three days later placed in a double cell in population. Pratt suffers from combat related stress disorders resulting from his Vietnam combat experience and has a history of constipation, hemorrhoids and abdominal pain which worsen when he is placed in a double cell. Throughout most of his incarceration Pratt has been housed in single cells due to his medical condition.

Pratt filed suit claiming that his transfers were the result of retaliation by prison officials because he had spoken to the media about his case. He sought a Preliminary Injunction (PI) against prison officials forbidding further retaliatory actions and ordering him transferred to a single cell in a Level M (medium security) prison. The district court granted the motion for a preliminary injunction.

The court discusses the standard applied in motions seeking PIs. "The moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and that the balance of the hardships tips sharply in his favor." The court held Pratt had shown a likelihood of success on the merits of his case.

It is illegal for prison officials to transfer prisoners solely in retaliation for the exercise of their first amendment rights. To state a first amendment claim under 42 U.S.C. § 1983, a prisoner must allege that officials' actions were retaliatory and did not serve any legitimate correctional goal, or were not tailored narrowly enough to meet that goal. See: *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985). "An act in retaliation for the exercise of a constitutional right is actionable even if the act, when taken for a different reason, would have been proper.... Retaliatory motive may be proven through circumstantial evidence." The timing and sequence of events can lead a trier of fact to conclude that actions are indeed retaliatory.

Examining the facts in this case, as well as the well proven record of past CDC retaliation against Pratt, the court concluded that the timing and sequence of events, as well as the obscured origin of the transfer order and circumvention of normal CDC transfer rules, all indicated that the transfer was retaliatory in nature. Pratt also showed a likelihood of harm due to his medical condition if he was still housed in a double cell. The court issued a PI ordering the CDC to house Pratt in a single cell in a level M prison. See: *Pratt v. Rowland*, 856 F. Supp. 565 (ND Cal 1994).

News in Brief

France: A French prison worker's union said it was suing 100 prisoners and detainees as a symbolic protest of under staffing in France's crowded jails. The unions said its members wouldn't be overworked if prisoners had respected the law and stayed out of jail.

Jamaica: Three prisoners convicted of robbing Italian tourists were sentenced to a flogging and 18 months in prison. Floggings are administered with a kerosene soaked switch in Jamaica. The punishment is seen as an effort by the Jamaican government to deal with a rising crime rate, after the highly publicized killing of a Florida tourist last year. That incident led to a dramatic drop off in Jamaica's billion dollar tourist industry.

Indiana: The Hendricks County probation office has installed a special sensor into the telephone mouthpiece of probationers convicted of alcohol convicted crimes. If the probationer answers the phone after drinking alcohol the sensor sends a signal to the probation officer's computer which alerts a probation officer who goes to the residence and conducts an alcohol test. The device is used in conjunction with electronic monitoring devices and the probationer is not told about the sensor in the phone. Participants pay \$3 to \$25 a day to use the phones, depending on their income. The \$160,000 system has caught nine drinkers to date.

Pennsylvania: Philadelphia judge Riccardo Jackson added 35 to 70 years to the sentence of Derrick Shaw who called the judge a "house nigger." Shaw was initially sentenced to 7 to 15 years for armed robbery and kidnapping. After cursing the judge, he was called back to the court and resented to 42 to 85 years. Both men are black.

South Korea: On October 6, 1994, the South Korean government hanged fifteen prisoners, all of whom had been convicted of murder, in a "crime crackdown." The executions were the first in 22 months and were carried out in Seoul and two other cities. 42 prisoners remain on South Korea's death row.

Colombia: A prisoner sentenced and convicted of assassinating then Justice Minister Rodrigo Lara Bonilla in 1984, was spotted partying in a fancy Bogota disco with several other prisoners after an anonymous caller tipped prosecutors. Prosecutors raided La Picota prison in

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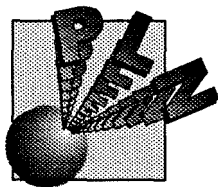
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Bogota where the prisoners were supposedly confined and found their cells locked and empty. Guards blamed each other for the prisoners' absence. The seven prisoners returned to their cells, drunk, the next morning. Two guards were arrested.

Virginia: Clark County Circuit Judge James Berry denied Oliver North a concealed weapons permit stating that North's felony convictions arising out of the Iran-Contra escapades showed he was "not of good character."

Illinois: Joe Burrows was released from prison after spending 5 years on death row for a murder he did not commit. Prosecutors concealed evidence from the defense indicating that the lead witness against Burrows had confessed to the crime. Since 1970 about 50 people have been freed from death row after their convictions were thrown out, usually because they were innocent of the crime they were convicted of.

Washington: The National Rifle Association (NRA) has donated \$10,000 to the "Hard Time for Armed Crime" initiative 159 (See *PLN*, Vol. 5, No. 8) in an effort to get it onto the November 1995 ballot or present it to the legislature before then.



Kurdish Prisoners Resist

Kurdish political prisoners at the Diyarbakir maximum security prison in Turkey battled soldiers on October 4, 1994, in an attempt to block the torture and interrogation of another prisoner. Turkish soldiers fired shots into the air and tear gassed the prisoners, who responded by throwing broken glass and rocks. About 157 prisoners were involved in the struggle. An undisclosed number of prisoners were injured and soldiers soon regained control of the prison but did not immediately storm cell blocks occupied by protesting prisoners.

The prisoners were all members of the PKK, Kurdish Worker's Party, an armed communist party seeking the independence of Kurdistan. Since 1984 the PKK has fought a bitter war against the

Turkish government and army. The war has been characterized by massive human rights abuses against the Kurdish civilian population and captured combatants. Those desiring more information about the PKK and its struggle should write: Kurdistan Information Center, 11 Portland Gardens, P.O. Box 1922, London, N4 1DL, England.

Russian Jails in Crisis

For decades the United States government used its propaganda machine to rail about the former Soviet Union's prison system. That the American government is silent about the new Russian prison system is more an indication of the fact that Russia has formally restored capitalism and reached an accommodation with foreign capital rather than any improvements in its prison system. As capitalism takes hold in Russia, with the massive impoverishment of the population, the new Russian state increasingly relies on imprisonment to keep the population and "crime" in check. Recent reports indicate jails are in the worst state they have been in for nearly a century.

Valery Abramkin, the director of the Moscow Center for Prison Reform, recently visited Moscow's Butyrka prison, which houses pre trial detainees. The prison was built over 200 years ago by Catherine the Great to hold 3,000 prisoners. It now holds over 6,000. He stated that cells built for 28 prisoners now hold up to 110. When parliament members went to the prison to investigate conditions he said they had to push their way through the crowd like a bus at rush hour. "Some of us fainted after five minutes. In daytime there is nowhere to sit. At night prisoners sleep in three shifts."

Abramkin, who served over six years in Soviet prisons concludes "Being detained in Russian jails nowadays is even more terrible than it was in Soviet prisons." Alvin Bronstein, the director of the ACLU's National Prison Project, toured Butyrka in 1992 and stated "The place was dirty and damp, and hot, with exposed wires all around, and leaking toilets and faucets. The prison director indicated he had no money for cleaning supplies or paint. It was as bad as anything I had ever seen."

Detainees not accused of capital crimes can spend between one and five years awaiting trial. The Kresty prison in St. Petersburg was built to hold 1,000 prisoners at the turn of the century, it now holds more than 10,000. Up to fourteen prisoners are kept in cells measuring 8 square yards (approx. 10' x 7'). The police colonel in charge of St. Petersburg prisons has informed prosecutors he will no longer accept people under investigation. "I don't want to be an executioner," he said.

The report stated that guards often beat detainees. Russia's 164 jails and detention centers have a capacity of 153,000 detainees but hold more than 240,000 people. 160,000 are not even charged with a crime but merely under investigation. The results of the overcrowding are high levels of violence, disease and suicides. Needless to say, the American government is strangely silent about this state of affairs. Just a decade ago this would have been the object of outrage and criticism. It indicates that concern for "human rights" is used solely as a propaganda tool to advance American interests rather than human welfare.

Ex-Prison Boss Assassinated in Turkey

Mehmet Topac was a former minister of justice from 1988-89 in Turkey as a member of the right wing Motherland Party. While he held that position, which controls the Turkish prison system, he instituted rules requiring leftist political prisoners to wear uniforms and limiting visits from attorneys and relatives. Hundreds of leftist political prisoners went on hunger strikes to protest the rules and two died before the rules were revoked.

On September 29, 1994, four guerrillas of Devrimci Sol, an armed communist party which means Revolutionary Left in English, shot Topac twice in the head in his Ankara law office. Topac died at the scene. Devrimci Sol left leaflets at the scene claiming responsibility for the attack. Since initiating its armed struggle for seizing state power in 1978, Devrimci Sol has assassinated dozens of military and political officials in Turkey as part of its guerrilla campaign. Hundreds of its members languish under harsh conditions in Turkish prisons as political prisoners.